APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED NOVEMBER 16, 2004

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 03-5055

CHEROKEE NATION OF OKLAHOMA,
on behalf of all its members,

Plaintiff-Appellant,

v.

GALE NORTON, Secretary of the United States Department of the Interior, AURENE MARTIN, Acting Assistant Secretary of the United States Department of the Interior, and DELAWARE TRIBE OF INDIANS,

Defendants-Appellees.

Nov. 16, 2004.
As Amended on Denial of Rehearing Feb. 16, 2005.

Before **SEYMOUR**, **BALDOCK**, and **HARTZ**, Circuit Judges.

BALDOCK, Circuit Judge.

The Cherokee Nation of Oklahoma ("Cherokee Nation") and Delaware Tribe of Indians ("Delawares") entered into a contract pursuant to a treaty negotiated between the Cherokee

Nation and the United States Government. The Supreme Court has twice interpreted that contract. We must decide in this case whether the Department of Interior's ("DOI") interpretation of that contract and concomitant decision to extend Federal recognition to the Delawares is contrary to the Supreme Court's reading of the same document.

I.

The law governing Federal recognition of an Indian tribe is, today, clear. The Federally Recognized Indian Tribe List Act of 1994 provides Indian tribes may be recognized by: (1) an "Act of Congress;" (2) "the administrative procedures set forth in part 83 of the Code of Federal Regulations[;]" or (3) "a decision of a United States court." Pub. L. No. 103-454, § 103(3), 108 Stat. 4791; *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547-48 (10th Cir. 2001). A recognized tribe is placed on the DOI's "list of recognized tribes[.]" 25 U.S.C. §§ 479a(3), 479a-1; 25 C.F.R. § 83.5(a).

The Delawares had never been on the list prior to this lawsuit. The Delawares began a quest for Federal recognition in 1992. They submitted a letter to the DOI expressing an intent to petition for Federal acknowledgment under the "Part 83 procedures." *See* 25 C.F.R. §§ 83.1, 83.4. The DOI informed the Delawares it would not consider their petition. The agency explained the "Delawares have not existed as an independent political identity since 1867, and have been absorbed into the Cherokee Nation of Oklahoma for general governmental purposes since that time." The Delawares, in response, requested instructions for filing an appeal. The DOI

thereafter reaffirmed its position, but "clarified" its previous non-appealable advisory letter did not prevent the Delawares from petitioning under the Part 83 procedures.

The Delawares never formally petitioned for acknowledgment. Instead, they requested the DOI to "reconsider and retract" the agency's position, as expressed in a 1979 letter, that it would only engage in government-to-government relations with the Delawares through the Cherokee Nation. The agency conducted a "legal review" of the situation at the Delawares' behest. The DOI concluded the 1979 position should be retracted and published a "notice of intent" to do the same. *See* 61 Fed. Reg. 33,534-35 (June 27, 1996). The DOI elected not to follow the Part 83 procedures because they do not apply to "already acknowledged" tribes; and under the agency's new position, the Delawares had been acknowledged since 1867. *See* 25 C.F.R. § 83.3(b). The agency issued its final decision, after notice and comment, in September 1996. *See* 61 Fed. Reg. 50,862-63 (Sept. 27, 1996). The final decision declared "the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian Tribe." *Id.* at 50,863.

On October 2, 1996, the Cherokee Nation sued the DOI. *Cherokee Nation of Okla. v. Babbitt*, 944 F. Supp. 974 (D.D.C. 1996). The Nation alleged the agency violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, when it extended recognition to the Delawares. The district court, upon the DOI's motion, dismissed the suit because the Delawares were an indispensable party that could

not be joined because of sovereign immunity. *Cherokee Nation*, 944 F. Supp. at 986. The D.C. Circuit reversed, holding the Delawares could not assert sovereign immunity because they relinquished their tribal sovereignty when they entered into an agreement with the Cherokee Nation in 1867. *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1503 (D.C. Cir. 1997). The D.C. Circuit, however, limited its holding to the joinder issue and remanded the case for the district court to decide the "proper interpretation of the 1867 agreement with the Delaware Tribe[ ] as a party to the proceedings and in light of the full administrative record[.]"[1] *Id.* at 1503 n.15. On remand, the district court transferred the case to the Northern District of Oklahoma because it lacked personal jurisdiction over the Delawares.

There, the district court extended "great deference" to the DOI and concluded its retraction of the 1979 letter did not violate the APA. *Cherokee Nation of Okla. v. Norton*, 241 F. Supp. 2d 1368, 1373-74 (N.D. Okla. 2002). The court reasoned the Delawares were a federally recognized tribe prior to 1979 because (1) a claims statute appropriated funds to the "Delaware Tribe of Indians," and (2) "the Supreme Court explicitly and unambiguously declared that the Delaware Tribe of Indians was a federally recognized Indian tribe in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977)." *Id.* at 1372-73. The court therefore did not consider the initial 1867 agreement entered into between the Cherokee Nation and Delawares. *Id.* at 1372.

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1. The D.C. Circuit's opinion is not the law of the case because the court did not reach the merits of the Cherokee Nation's claim. *See United States v. Hatter*, 532 U.S. 557, 566 (2001).

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The Cherokee Nation appeals. We have jurisdiction, 28 U.S.C. § 1291, and "afford no particular deference to the district court's review of [the] agency['s] action; our review of the administrative record pertaining to the challenged action is independent." *Pennaco Energy Inc. v. United States Dep't of the Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) (internal quotations and citation omitted). Because the DOI's final decision is contrary to Supreme Court precedent and the Federally Recognized Indian Tribe List Act, we reverse.

II.

The APA requires an agency to articulate a satisfactory explanation for its action. *Kansas v. United States*, 249 F.3d 1213, 1228-29 (10th Cir. 2001). Agency action *must* be upheld, if at all, on the basis the agency articulated. *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974); *Pennaco Energy Inc.*, 377 F.3d at 1157. An agency's action, on the other hand, may be set aside under the APA if it is arbitrary, capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2)(A). "And the Act has been interpreted . . . to require agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations[.]" *Miami Nation of Indians of Ind., Inc. v. United States Dep't of the Interior*, 255 F.3d 342, 348 (7th Cir. 2001); *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002). Furthermore, although the APA's arbitrary and capricious standard is ordinarily a deferential one, *see id.* at 1164, such deference is not unfettered nor always due. *See General Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, __, 124 S. Ct. 1236, 1248 (2004) (explaining no deference is owed to a clearly wrong agency

interpretation); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649-50 (1990) *superceded by* 29 U.S.C. § 1854 (explaining a precondition to agency deference is a congressional delegation of administrative authority); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (explaining an agency interpretation that conflicts with an earlier interpretation is entitled to considerably less deference than a consistently held position).

In this case, the DOI based its final decision on a "legal analysis of the pertinent treaties and agreements as well as a review of [its] administrative practice." 61 Fed. Reg. at 50,863. More specifically, the agency's recognition of the Delawares was based solely on its *analysis of the treaties and agreements* entered into by the Cherokee Nation and Delawares in the 1860s. The DOI's "review" of its administrative practice over the next century was simply to confirm the Delawares' status. The DOI does *not* maintain its administrative practice from 1867 to 1979 "reconstituted" or "restored" the Delawares as a tribe.[2] The resolution of

2. The Delawares have advanced an alternative "restoration" argument. They assert the "modern-era record alone is more than sufficient to sustain the [DOI's] 1996 decision, even if this Court were to disagree with the [DOI's] interpretation of the historical documents in this case." The district court ostensibly relied on a restoration theory to sustain the DOI's decision. *See Cherokee Nation*, 241 F. Supp. 2d at 1372-74. The district court erred because the DOI did not articulate "restoration" as a basis for its final decision. *See Texaco*, 417 U.S. at 397; *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Further, the DOI conceded at oral argument its position rested solely on a theory that the Delawares preserved their tribal identity when

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this case thus turns on the status of the Delawares under the treaties and the agreements entered into by the Cherokees and Delawares in the 1860s. We do not afford any deference to the DOI's position on this issue because Congress did not give it the discretion to administer those treaties and agreements. *Adams Fruit Co.*, 494 U.S. at 649; *Citizen Band of Potawatomi Indian Tribe of Okla. v. Collier*, 142 F.3d 1325, 1332 (10th Cir. 1998); *see also Cherokee Nation*, 117 F.3d at 1499. We now turn to those treaties and agreements.

III.

The history of the Delawares' tortured migration westward has been told elsewhere, *see Weeks*, 430 U.S. at 75-79 & n.2, and we need not repeat it. Suffice it to say, the "main body" of Delawares resided on a reservation in Kansas in the 1850s. *Id.* at 77. Notwithstanding promises to the contrary, *see id.*, the United States sought to move the Delawares again in 1866. To that end, the United States entered into a treaty with the Delawares. *Treaty with the Delawares*, July 4, 1866, U.S.-Del. Indians, 14 Stat. 793 ("1866 Delaware Treaty"). The 1866 Delaware Treaty provided, among other things, the Delawares could purchase from the United States "a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees

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they relocated to the Cherokee Nation. We therefore decline to consider the Delawares' "restoration" argument because the issue is not properly before the court. We leave for another day what effect, if any, the post-1867 legislative and executive dealings with the Delawares had on their alleged status as a tribe. *See infra* at 23 [App. A at 6a n.2].

in the Indian country [now Oklahoma], to be selected by the Delawares in one body in as compact form as practicable[.]"

The United States subsequently entered into a treaty with the Cherokee Nation. *Treaty with the Cherokee*, July 19, 1866, U.S.-Cherokee Nation, 14 Stat. 799 ("1866 Cherokee Treaty"). Article 15 of the 1866 Cherokee Treaty provided an "incorporation option" and "preservation option" for friendly Indians settling upon Cherokee lands:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz:
>
> [*Incorporation Option*] Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be *incorporated into* and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens.

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[*Preservation Option*] And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a *district of country set off for their use by metes and bounds* equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and

> [1] shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States....
>
> [2] And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees.

(emphasis added).

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On April 8, 1867, the Cherokee Nation entered into "Articles of Agreement" with the Delawares ("1867 Agreement") pursuant to Article 15 of the 1866 Cherokee Treaty. The preamble to the 1867 Agreement provides the Cherokee Nation and Delawares held a "full and free conference . . . looking to a location of the Delawares upon the Cherokee lands, *and* their *consolidation* with said Cherokee Nation[.]" (emphasis added). The agreement provided for both conditions.

The Cherokee Nation first "agree[d] to sell to the Delawares, for their *occupancy*, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres of land for each [registered] individual of the Delaware Tribe . . . [with] the selections of the lands to be purchased . . . made by said Delawares in *any part* of the Cherokee reservation east of said line of 96°[.]"[3] (emphasis

3. The Delawares sent a delegation to the Cherokee Nation in October 1866 for "the purpose of selecting a new home for their people [.]" The delegation did not locate any suitable land west of the 96° meridian, but did find a satisfactory ten-by-thirty mile tract east of the 96° meridian. John Connor, principal chief of the Delawares, thereafter sent a letter to William P. Ross, principal chief of the Cherokee Nation, explaining the delegation had found a suitable tract of land the Delawares could settle upon to preserve their tribal organization under the 1866 Cherokee Treaty. The letter requested the matter be presented to the Cherokee National Council for final action. No evidence exists showing the matter was ever proposed to the council. Instead, the Delawares sent a delegation, of which John Connor was a part, to Washington D.C. to perfect the arrangement for relocating the Delawares to the Cherokee Nation. There, the Delaware delegation entered into the 1867 Agreement, which the President approved as the agreement and 1866 Cherokee Treaty required.

added). The Delawares paid $157,600 (one dollar per acre) for such occupancy rights and a preferred allotment position. The "Delawares further agree[d], that there shall be paid . . . a sum of money, which shall sustain the same proportion to the existing Cherokee National fund, that the number of Delawares registered as above mentioned, and removing to the Indian country, sustains to the whole number of Cherokees residing in the Cherokee Nation." The Delawares paid $121,824.28 into the Cherokee national fund based on the formula recited in the agreement. The 1867 Agreement concluded:

> On fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, *shall* become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other,) in the national funds, as *native* Cherokees, save as hereinbefore provided. And the children hereafter born of *such Delawares so incorporated* into the Cherokee Nation, shall in all respects be regarded as *native Cherokees.*

(emphasis added).

The 1867 Agreement was "subject to the approval of the President of the United States[.]" The Secretary of the DOI, then Orville H. Browning, transmitted the agreement to the President. Secretary Browning's transmittal letter explained the agreement "provid[ed] for *uniting the two tribes*, as contemplated by the Cherokee Treaty of July 19th 1866" and "recommend[ed] that it be approved." (emphasis added).

President Andrew Johnson approved the agreement. The registered Delawares fulfilled all of the stipulations in the 1867 Agreement and moved onto selected 160-acre tracts scattered throughout the Nation.

IV.

The genesis of the present case is the DOI's 1996 decision to extend Federal recognition to the Delawares based on its legal analysis of the 1866 Cherokee Treaty and 1867 Agreement. The agency concluded the agreement evidenced the Delawares' election of the treaty's "preservation option" because it required two payments (whereas the incorporation option only required one) and Delawares made two payments ($157,600 and $121,824) to the Cherokee Nation. The DOI therefore maintains the Delawares preserved their tribal identity when they moved to the Cherokee Nation in the 1860s.

We do not begin with a clean slate. In fact, *every court* to consider the actual terms of the 1866 Cherokee Treaty and 1867 Agreement has explicitly or implicitly rejected the DOI's reading of the agreement. *See Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 311 (1893) *aff'd as modified* 155 U.S. 196 (1894) (holding that under the 1867 Agreement "two independent bodies politic united and became one, the lesser, according to its terms, being merged into the greater."); *Cherokee Nation v. Journeycake*, 155 U.S. 196, 210-11 (1894) (holding that under the 1867 Agreement the "Delawares became incorporated into the Cherokee Nation, and are members and citizens thereof[.]"); *Delaware Indians*

v. Cherokee Nation, 38 Ct. Cl. 234, 256 (1903) *aff'd* 193 U.S. 127 (1904) (holding that "[b]y the introduction and admission of the Delawares as part of the Cherokee Nation they became a part of the people of such nation and bound in common with the Cherokees by the political power of the nation [.]"); *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 135 (1904) (reaffirming the purpose of the 1867 Agreement was "to incorporate the registered Delawares into the Cherokee Nation, with full participation in the political and property rights of citizens of that nation."); *Cherokee Nation*, 944 F. Supp. at 982 *rev'd on other grounds* 117 F.3d 1489 (D.C. Cir. 1997) (holding the "Delaware[s] settled in Cherokee Nation territory pursuant to the first provision of Article 15, under which the settling Delaware became full and equal Cherokee Nation citizens."); *Cherokee Nation*, 117 F.3d at 1503 (holding that "by entering into the 1867 Agreement the Delaware Tribe of Indians relinquished its tribal identity or sovereignty in relation to the Cherokee Nation."). We now join them.

A.

In *Journeycake*, 155 U.S. at 196, the Supreme Court considered a dispute between the Delawares and Cherokee Nation over the proper distribution of national funds. The Cherokee National Council had directed certain rent proceeds be distributed to "native Cherokees," to the exclusion of Delawares. The Delawares filed suit in the court of claims, alleging the Cherokee Nation's discriminatory distribution of the rental proceeds violated the 1867

Agreement.[4] The case therefore "hinge[d] on the status of the individual Delawares as members and citizens of the Cherokee Nation, and the rights secured to them by the agreement of April 8, 1867." *Id.* at 204.

The Court, after reviewing the 1866 Cherokee Treaty and 1867 Agreement, easily concluded that because "the registered Delawares have become incorporated into the Cherokee Nation, and are members and citizens thereof, it follows necessarily that they are, equally with the native Cherokees, the owners of, and entitled to share in the profits and proceeds of, [the leased] lands." *Id.* at 210-11. The Court rejected the Cherokee Nation's arguments to the contrary based on the "plain import of the language used in the [1867] agreement[.]" *Id.* at 216. The agreement's language compelled the Court to "conclude that by such agreement the Delawares became incorporated into the Cherokee Nation,

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4. As a result of disputes arising between the Delawares and Cherokee Nation over the proper distribution of monies from the Cherokee national fund, *see* Act of October 19, 1888, Chap. 1211, 25 Stat. 608, Congress enacted a statute providing the court of claims with jurisdiction "to determine ... the just rights in law or in equity of the . . . Delaware Indians, who are settled and incorporated into the Cherokee Nation[.]" Act of October 1, 1890, Chap. 1249, § 1, 26 Stat. 636. The Act provided the Delawares with a private cause of action, "either separately or jointly," against the Cherokee Nation and "[t]hat the said suit or suits may be brought in the name of the principal chief or chiefs of the said . . . Delaware Indians[.]" *Id.* §§ 2-3. Charles Journeycake, principal chief of the Delawares, filed suit under the Act on behalf of the Delawares. *See Journeycake*, 28 Ct. Cl. at 319 (decreeing the rights "of the Delaware Indians who are settled and incorporated into the Cherokee Nation"); *see also* C.A. Weslager, *The Delaware Indians: A History* 447 (1972) (explaining Journeycake was "authorized and empowered" to represent the Delawares in court).

became members thereof, and, as such, entitled equally with the native Cherokees to all their rights in the reservation and [leased lands]." *Id.*

In so holding, the Court considered evidence of the Delawares' two payments to the Cherokee Nation, *id.* at 203, and specifically analyzed the Delawares' purchase of land occupancy rights. *Id.* at 212-15. The Court nevertheless found the 1867 Agreement expressed the parties' intent to incorporate the Delawares for two reasons. First, the parties did not provide for the "setting apart of a distinct body of land in any portion of the reservation for the Delaware tribe[.]" *Id.* at 205. The Court explained the Delawares' failure to purchase a "distinct body of lands" was inconsistent with the settlement of "*tribes as tribes* within the limits of the Cherokee Nation." *Id.* at 213 (emphasis added). Second, the Delawares did not purchase their lands in fee simple, *see id.* at 212, 214-15, but instead acquired occupancy rights in kind with all Cherokees and a preferential allotment position. *Id.* at 213. "All this was in the line of the expressed thought of a consolidation of the[] Delawares with, and absorption of them into, the Cherokee Nation as individual members thereof." *Id.*

Subsequently, in *Delaware Indians*, 193 U.S. at 127, "the Delaware Indians residing in the Cherokee Nation, *as a tribe and individually*, . . . su[ed] . . . for the purpose of determining the right of the Delaware Indians in and to the lands and funds of [the Cherokee] nation under the contract and agreement . . . dated April 8, 1867." *Id.* at 129 (emphasis added) (internal quotation and citations omitted); *see also* Act of June 28, 1898, Chap. 517, § 25, 30

Stat. 495, at 504. The Court first rejected the Delawares' claim that the 1867 Agreement secured to them, as a tribe, their selected lands east of the 96° meridian. *Delaware Indians*, 193 U.S. at 134-35. The Delawares' argument failed because it was contrary to the Court's *holding* in *Journeycake* and inconsistent with their purchase of occupancy rights, which were "conferred *not* upon the Delaware Nation, but upon certain registered Delawares who [were] incorporated into the Cherokee Nation." *Id.* at 135 (emphasis added).

The Court also rejected the Delawares' argument that they individually owned their selected tracts in fee simple. The Court explained the adult Delawares had only purchased occupancy rights in the Cherokee lands under the 1867 Agreement. Furthermore, the agreement provided "'the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall, in all respects, be regarded as native Cherokees.'" *Id.* at 138. The Court found

> [t]his provision is *utterly inconsistent* with the grant of an estate in the lands to survive the 'occupancy' of the registered Delawares. Such children are to have the rights of native Cherokees, and no more. Their parents were incorporated into the Cherokee Nation with certain specific rights; the children were to stand upon an equality with their adopted brethren of the Cherokee blood.

Id. (emphasis added). The Court accordingly held the Delawares only obtained life estates in their lands selected under the 1867 Agreement. *Id.* at 143.

The Delawares nevertheless insisted the 1867 Agreement "should not be literally enforced in view of the understanding of the parties[ ]" and sought to introduce parol evidence. *Id.* at 140. The Court, however, found the contract unambiguous and rejected the Delawares' resort to parol evidence. *Id.* at 140-42. The Court explained "no room" existed in the case to "depart[ ] from the familiar rules of law protecting written agreements from the uncertainties of parol testimony." *Id.* at 141. "In light of the circumstances and the language used in the writing, its construction [was] not rendered difficult because of latent ambiguities." *Id.* The Delawares were therefore entitled to their occupancy and preferential allotment rights, but "[i]n all other respects *the Cherokee citizens, whether of Delaware or Cherokee blood,* should be given equal rights in the lands and funds of the Cherokee Nation." *Id.* at 146 (emphasis added).[5]

B.

Based on the foregoing, the DOI's conclusion the Delawares preserved their tribal identity under the 1866

5. The D.C. Circuit concluded in this case the Delawares were not entitled to assert sovereign immunity. *Cherokee Nation*, 117 F.3d at 1503. Relying on *Journeycake* and *Delaware Indians*, the D.C. Circuit held the Delawares relinquished their tribal sovereignty in relation to the Cherokee Nation because the two tribes consolidated into a single unit under the 1867 Agreement. *Id.* at 1501-03. The court explained the Delawares' two payments to the Cherokee Nation was consistent with their election to settle under the 1866 Cherokee Treaty's incorporation option. Furthermore, the parties' "use of the term 'incorporated' in the 1867 Agreement [was] sufficiently unambiguous to constitute an express relinquishment of the Delawares' status as a separate sovereign." *Id.* at 1501.

Cherokee Treaty and 1867 Agreement is *clearly* contrary to Supreme Court precedent. The "rights adjudicated" in *Journeycake* and *Delaware Indians* "turned upon the construction of the agreement of April 8, 1867, and its nature and the history of the events which led up to its execution[.]" *Delaware Indians*, 193 U.S. at 134. The Court held the unambiguous language of the 1867 Agreement provided for the Delawares' incorporation into the Cherokee Nation with their children taking only the same rights as other citizens. *Id.* at 143; *Journeycake*, 155 U.S. at 216. We are "bound by the Supreme Court's interpretation of that Agreement in *Journeycake* and *Delaware Indians*." *Cherokee Nation*, 117 F.3d at 1500; *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). "An agency also *must* conform its conduct to a decision of the Supreme Court in all future cases, even if the agency believes that the Court was wrong." 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.9, at 129 (2002) (emphasis added).

Our task is therefore simple. Although we seek to avoid engaging in a repetitive analysis of the 1866 Cherokee Treaty and 1867 Agreement—an analysis the Supreme Court has twice engaged in—we again explain why the Delawares did not preserve their tribal identity under those documents. The 1866 Cherokee Treaty provided for the settlement of Indians within the Cherokee Nation. The terms the tribes agreed upon for such settlement, however, had to be "consistent" with one of the options provided in Article 15 of the 1866 Cherokee Treaty. The unambiguous language of the 1867 Agreement, including the provisions for the Delawares' two payments, is consistent with the Delawares' selection of the incorporation option of Article 15. Specifically, the

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Delawares made a proportional payment of $121,824 into the national fund and provided they were consolidating with and incorporating into the Cherokee Nation. That the Delawares made an additional payment of $157,600 for land occupancy and preferential allotment rights is not inconsistent with the incorporation option. In contrast, and for the reasons detailed below, the language of the agreement and the nature of its execution are inconsistent with Article 15's preservation option.

To begin, the 1867 Agreement describes the Delawares consolidation with or incorporation into the Cherokee Nation three times. We agree with the Supreme Court (as we must) and the D.C. Circuit that the agreement's language is unambiguous. *Delaware Indians*, 193 U.S. at 141; *Cherokee Nation*, 117 F.3d at 1501. "Consolidation" and "incorporation" carried the same meanings in 1867 as they do today: to unite. *Compare Webster's Dictionary of the English Language* 279 (consolidate), 677 (incorporate) (1864) *with Webster's Third New International Dictionary* 484 (consolidate), 1145 (incorporate) (1981). The DOI nevertheless concluded "the Agreement uses the language 'consolidation' in the context of the physical location of the Delaware from Kansas to Cherokee country, not in the context of governmental purposes." The agency's reading is, however, inconsistent with the plain language of the 1867 Agreement, which provides the parties were "looking to a location of the Delawares upon the Cherokee lands, *and* their consolidation with said Cherokee Nation[.]" (emphasis added). With respect to "incorporation," the DOI suggests the language can be read consistent with Article 15's preservation option. Perhaps. The problem is the Supreme Court specifically

rejected the DOI's reading in *Delaware Indians*. There, the Court explained the "Delawares *were made part of the Cherokee Nation* " and became "a *component part* " of the nation "on equal terms with other citizens." *Delaware Indians*, 193 U.S. at 144 (emphasis added). Furthermore, the agreement provides Delaware children shall be regarded as *native Cherokees*. Such a provision is wholly inconsistent with the "preservation" of tribal identity. *See Cherokee Nation*, 117 F.3d at 1502.

Next, as the Supreme Court explained, the 1867 Agreement is important for what it does not contain. Article 15's preservation option contains the mandatory condition that tribes settling under it "*shall* have a district of country set off for their use by metes and bounds[.]" (emphasis added). In *Journeycake*, 155 U.S. at 205, 213, the Court twice mentioned the agreement's crucial omission of a "provision for the setting apart of a distinct body of lands" to support its *holding* the Delawares "became incorporated into the Cherokee Nation[.]" *Id.* at 216.

In this appeal, the Delawares (and to a lesser extent the DOI) advance the novel theory they actually selected and settled upon a ten-by-thirty mile tract of land in the Cherokee Nation. Absolutely nothing in the administrative record supports the Delawares' theory. *See supra* n.3. Instead, the 1867 Agreement "contemplate[d] personal selection of separate tracts by individual Delawares." *Journeycake*, 155 U.S. at 205. The agreement's language could not be more clear: "the selections of the lands to be purchased by the Delawares, may be made by said Delawares in *any part* of the Cherokee reservation east of said line of 96°[.]" (emphasis

added). The evidence in the administrative record demonstrates the Delawares did, in fact, select individual tracts of lands for their homes throughout the reservation. That some, or even "most," Delawares selected their tracts in the Cooweescoowee district of the reservation is immaterial.

Most importantly, the DOI's theory that the Delawares' two payments to the Cherokee Nation evidences "preservation" rather than "incorporation" is misguided. In *Journeycake*, 155 U.S. at 203, the Court was aware of the payments and did not express any disagreement with the finding that the Delawares' proportional payment into the national fund was not "susceptible of misconstruction and concerning it no controversy has arisen." *Journeycake*, 28 Ct. Cl. at 307. The Court then based its decision on the land purchase payment. In fact, the Court considered the Delawares' purchase of land occupancy rights indicative of their intent to incorporate. *Journeycake*, 155 U.S. at 212-13. Further, the Court reaffirmed *Journeycake's* holding and reasoning in *Delaware Indians*, 193 U.S. at 143, when it concluded the Delawares only purchased life estates in the Cherokee lands. The Delawares' purchase of life estates in scattered tracts throughout the Cherokee Nation is inconsistent with the actions of a people seeking to "preserve" their tribal identity.

The DOI and Delawares also argue the 1867 Agreement is ambiguous and urge us to consider parol evidence. We decline for three reasons. First, the admission of parol evidence is improper because the 1867 Agreement is unambiguous. *See Richardson v. Hardwick*, 106 U.S. 252,

254 (1882); *Eastern Band of Cherokee Indians v. United States*, 117 U.S. 288, 311 (1886). Second, we cannot tell the Supreme Court that it incorrectly concluded the agreement did not suffer from any ambiguities requiring the consideration of parol evidence. *Delaware Indians*, 193 U.S. at 141; *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam) (explaining that "unless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). Third, and *assuming* for the moment the agreement is ambiguous (which it is not) and the Supreme Court had not held it unambiguous (which it did), the Delawares would still not be in any better position. The parties' contemporaneous actions evidenced their belief the Delawares incorporated into the Cherokee Nation.[6] *See Journeycake*, 155 U.S. at 216-17.

6. For example, then-Secretary Browning described the 1867 Agreement as providing for the uniting of two tribes. *See also Delaware Indians in Cherokee Nation—Allotment*, 25 Pub. Lands Dec. 297, 301-302 (Dep't of Interior 1897). The Delaware delegation that entered into the 1867 Agreement represented to the Commissioner of Indian Affairs that the Delawares had "merged" themselves into the Cherokee Nation. The Delaware Council, then in Kansas, recognized their delegation had entered into an agreement providing for the "incorporation or merging" of the tribe into the Cherokee Nation and protested the same. Despite the original dissension, the Delawares ultimately moved to the Cherokee Nation and began, as described in *Journeycake*, receiving per capita distributions from the Cherokee national fund as citizens. "[T]he first manifestation of a claim of difference between the native Cherokees and the registered Delawares as to the extent of their interests in the lands or the proceeds thereof" did not occur until 1883. *Journeycake*, 155 U.S. at 216-17.

We finally note the DOI's and Delawares' reliance on *Weeks* is misplaced. In *Weeks*, 430 U.S. at 75, the Supreme Court considered whether a claims statute excluding the "Kansas Delawares"—the Delaware Indians who remained in Kansas under the 1866 Delaware Treaty—from the statutory distribution of a claims award violated the Equal Protection Clause. The Court commented that "[d]espite their association with the Cherokees, these Indians, called 'Cherokee Delawares' in this suit, have over the years maintained a distinct group identity, and they are today a federally recognized tribe." *Id.* at 77 & n.8. The Court's dicta, *see Cherokee Nation*, 117 F.3d at 1502, indicated Congress' distribution of a claims award to the "Delaware Tribe of Indians," *see* Act of April 21, 1904, Chap. 1402, § 21, 33 Stat. 189, at 222, was sufficient to recognize the Delawares as a tribe for the limited purpose of the claims statute at issue in that case. *Weeks*, 430 U.S. at 77 n.8; *see also id.* at 94 (Stevens, J., dissenting). As Cohen's handbook on Federal Indian law explains:

> The question whether a group is a tribe for purposes of statutes allowing claims to be asserted against the United States has arisen many times. Where several Indian groups are generally considered a single tribe for political and administrative purposes, Congress may nevertheless assign tribal status to portions of the tribe for claims purposes. For example, Tribe A and Tribe B have combined to form Tribe C and share a common reservation and common funds. However, at some time prior to their merger, Tribe A had suffered an injury for which Congress later offers redress in the form of a jurisdictional act.

> In such a case Congress may recognize Tribe A as a tribe, entitled to bring suit in the Court of Claims, even though for most other purposes it is only a part of Tribe C.

See Felix S. Cohen, *Handbook of Federal Indian Law* Chap. 1, § B2d, at 12 (1982 ed.). For illustrative purposes, Cohen cites claims statutes allowing the *Delawares* to bring suit. *Id.* at 12 n.64; *see also Federal Indian Law* Chap. VI, § B-1, at 463 & n.32 (U.S. Dep't of Interior 1958); *Cherokee Nation*, 117 F.3d at 1502.

At most, *Weeks* stands for the proposition the Delawares reconstituted for claims purposes. Whether the Delawares were reconstituted—be it through Act of Congress or administrative practice—sometime after 1867 is not before us. *See supra* n.2. The present case, instead, turns on the DOI's interpretation of the 1866 Cherokee Treaty and 1867 Agreement. We thus have a duty to follow *Journeycake* and *Delaware Indians* because they directly control our interpretation of the agreement. Even *assuming Journeycake* and *Delaware Indians* conflict with the dicta in *Weeks* (which they do not), we nevertheless would be bound by those decisions. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (explaining that "[i]f a precedent of th[e] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e] Court the prerogative of overruling its own decisions."); *see also F.T.C. v. Kuykendall*, 371 F.3d 745, 752 (10th Cir. 2004) (en banc).

V.

We are not unsympathetic to the Delawares' cause. The DOI's unlawful actions, however, cannot provide the Delawares the status they seek. The agency's decision to extend recognition to the Delawares rested on an alleged "comprehensive legal analysis" that devoted three sentences, in a footnote, to the Supreme Court's decisions interpreting the 1866 Cherokee Treaty and 1867 Agreement. Agencies, like courts, must follow Supreme Court decisions and congressional acts. The DOI's recognition of the Delawares in this case was contrary to the United States Supreme Court's decisions in *Journeycake* and *Delaware Indians* and violated § 103(3) of the Federally Recognized Indian Tribe List Act.

Agencies, moreover, must follow their own rules and regulations. The DOI used a procedure heretofore unknown to the law—"retract and declare"—to purportedly re-recognize the Delawares. In so doing, the DOI's actions were arbitrary and capricious. The agency simply elected not to follow the Part 83 procedures for recognizing an Indian tribe and, furthermore, did not even properly waive application of those procedures. *See* 25 C.F.R. § 1.2. We accordingly hold unlawful and set aside the DOI's 1996 final decision. 5 U.S.C. § 706(2)(A). Any action taken by the agency on its 1996 final decision is void. "Further comment on this case is unnecessary." *Journeycake*, 155 U.S. at 218.

REVERSED.

SEYMOUR, Circuit Judge, concurring.

I agree with my colleagues that the Supreme Court's decisions in *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), control the outcome of this controversy. I therefore concur in the judgment. I write separately because I believe the majority unnecessarily denigrates the contrary position of the Delaware Tribe and the Department of Interior, which rely on the long and proud history of the Delaware Tribe's relations with the federal government to argue that the Tribe maintained its tribal sovereignty.[1] It is only after a very careful and particular examination of the Supreme Court's decisions in *Journeycake* and *Delaware Indians* in conjunction with an equally careful examination of the treaties and agreements they interpret, that one must conclude this controversy should be resolved in favor of the Cherokee Nation.

Contrary to the position adopted by the majority, I am not persuaded the terms of the 1867 Agreement between the Cherokees and Delawares were in fact, or had to be, completely consistent with the specific terms outlined in the 1866 Treaty between the Cherokees and the United States. The 1867 agreement was between two sovereign powers, one of which, the Delaware Tribe, was not bound by the Cherokee

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1. Indeed, the Department of Interior relies on the nearly 100 years of administrative practice of recognizing the Delaware Tribe to support its position that the Delawares remained a distinct tribal entity. *See* Aplt. app. at 241-266 (Department of Interior 1996 Memorandum listing in detail its many years of interacting with Delawares as a district tribe).

Treaty with the United States. In *Delaware Indians*, the Supreme Court indicated as much. The Court noted that while the 1867 Agreement between the Cherokees and Delawares was made in contemplation of the terms laid out in the 1866 Cherokee Treaty, the treaty should not be deemed to control in determining the terms and rights allocated in the 1867 Agreement. *Delaware Indians*, 193 U.S. at 134-35. The Court stated that

> the care with which [the agreement] was made and the evident intention of the parties to deal at arm's length with full knowledge of their respective rights and aims, leaves little to be gained from [the 1866 Cherokee Treaty and 1866 Delaware Treaty] as an aid to construction, except as a means of placing ourselves in the situation of the parties when the contract was signed and delivered.

Id. Hence, instead of viewing the 1866 Treaty as an exacting template against which to determine the Delawares' tribal status, the Supreme Court viewed the treaty as a general guide for determining the nature of the agreement between the Cherokees and Delawares.

Nor can it be said that the 1867 Agreement was entirely consistent with the terms set out in the 1866 Treaty. The Delawares' two payments to the Cherokee Tribe did not fit neatly within the payments described in either the preservation or incorporation option laid out in Article 15 of the treaty. *See Journeycake*, 155 U.S. at 196-98, 200-02 (setting out Article 15 of the Cherokee Treaty and the terms

of the 1867 Agreement). Similarly, the 1867 Agreement's language did not explicitly mirror the language laid out in either treaty option. Rather, the agreement seemed to mix and match language appearing in both the incorporation and preservation options of Article 15 of the treaty. The 1867 Agreement spoke of "looking to a location of the Delawares upon the Cherokee lands," *Journeycake*, 155 U.S. at 200, which is indicative of the preservation option. Indeed, the Court in *Journeycake* stated that the preservation option was one in which a tribe merely located itself "within the limits of the Cherokee Reservation." *Id.* at 204. However, in the same sentence in which the 1867 Agreement spoke of locating the Delawares upon Cherokee lands, the agreement also spoke of consolidating the Delaware Tribe with the Cherokee Nation. *Id.* at 200, 205. Similarly, the 1867 Agreement's last paragraph also contained language mixing the preservation and incorporation options. Some language mimicked that appearing in the treaty's preservation option which ensured that "preserved" tribes would be afforded the same rights as native Cherokees, while at the same time the 1867 Agreement's last paragraph used the word "incorporated," which can be directly ascribed to the incorporation option in the treaty.[2]

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2. As a point of comparison, the 1869 Agreement between the Shawnees and the Cherokees is similarly inconsistent with the 1866 Cherokee Treaty. The terms of that agreement by no means followed anything along the lines detailed in the 1866 Treaty, as acknowledged by the Supreme Court in *United States v. Blackfeather*, 155 U.S. 218, (1894). There the Court examined the terms of the 1869 Agreement and commented that the Shawnee agreement neither contained a provision for the purchase of homes nor a provision for the payment of money into the Cherokee national fund. *Id.* at 220. Nonetheless,

(Cont'd)

Appendix A

In reviewing the varying language which appeared in the 1867 Agreement between the Cherokees and Delawares, the Supreme Court indicated its belief that the Delawares incorporated themselves into the Cherokee Nation. *Journeycake*, 155 U.S. at 216; *see also Delaware Indians*, 193 U.S. at 135-37, 143-44. Instead of giving weight to the agreement's language stating that the Delawares were intending to locate their tribe on Cherokee lands, the Court focused on the agreement's language which spoke of the Delawares' consolidation with the Cherokees. *Journeycake*, 155 U.S. at 213. Likewise, in reviewing the relevance of the Delawares' two payments to the Cherokee tribe, the Court did not deem the second payment to be for a distinct set of lands under the preservation option of Article 15. Rather, the Court construed the land payment as a means by which the Delawares secured for themselves an allotment position, should the Cherokee lands be allotted in the future. *Id.* at 215. The preservation of an allotment interest for tribes settling on Cherokee land, whether by incorporation or preservation, was not mentioned in any regard in the 1866 Cherokee Treaty. Thus, although the terms of the 1867 Agreement did not fit neatly within either option outlined in Article 15 of the 1866 Treaty, the Supreme Court nonetheless decided the Delawares had opted for incorporation. The Court

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(Cont'd)
in looking at the language in the 1869 Agreement, which included a statement that the "Shawnees shall abandon their tribal organizations," *id.*, and language which followed almost exactly the incorporation language appearing in Article 15 of the 1866 Treaty, *id.*, the Court determined the Shawnees were incorporated into the Cherokee Tribe and should be afforded the same rights enjoyed by native Cherokees.

reached this decision by attributing more weight to the agreement's incorporation language than to the language which implied preservation, and by virtue of the Delawares' failure to obtain separate land within the Cherokee Reservation. *Journeycake*, 155 U.S. at 205-06, 213; *see also Delaware Indians*, 193 U.S. at 135-37. The reason for this conclusion may have been in part due to the litigation position taken by the Delawares. In this regard, the Complaint filed in *Journeycake* by the Delawares asserted that under the 1867 Agreement, the Delawares had "abandoned their separate tribal organization." Aplt. supp. br., Second supp. add. at 8.

In sum, I am ultimately compelled to conclude the Supreme Court determined in *Journeycake* and *Delaware Indians* that the Delaware Tribe incorporated itself into the Cherokee Nation and abandoned its tribal sovereignty when it entered into the 1867 Agreement. Accordingly, it is irrelevant that the subsequent history of the Delaware Tribe's relations with the federal government and the Supreme Court's *dicta* in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), on which the Department of Interior's 1996 decision in favor of the Delawares relied, arguably indicate to the contrary. *See Weeks*, 430 U.S. at 77 ("Despite their association with the Cherokees, these Indians, called 'Cherokee Delawares' . . . have over the years maintained a distinct group entity, and are today a federally recognized tribe.").

I therefore agree that we must **REVERSE.**

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AND FILED JULY 23, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 98-CV-903-H

CHEROKEE NATION OF OKLAHOMA, on behalf of all its members, Plaintiff,

v.

Gale NORTON, in her official capacity as Secretary of Interior of the United States Department of Interior; NEAL McCALEB, in his capacity as Assistant Secretary of the Department of the Interior; and THE DELAWARE TRIBE OF INDIANS, as an indispensable party pursuant to Federal Rule of Civil Procedure 19,

Defendants.

ORDER

This matter comes before the Court on motions by each of the parties with respect to a decision by the Secretary of Interior (the "Secretary") in 1996 to withdraw a letter issued by an official in the Department of Interior (the "Department") in 1979 (the "1979 letter"). The effect of such withdrawal was to re-establish certain dealings between the United States and the Delaware Tribe of Indians. For the reasons set forth below, the Court finds that the Secretary's withdrawal of the 1979 letter should be upheld as an

appropriate exercise of the Secretary's authority. The Court further finds, however, that this determination may not resolve all the issues in this case and that additional questions must be addressed as described more fully herein below.

I

The procedural facts that form the basis of the present action were set forth in Federal Defendants' Response Brief to Plaintiff's Opening Brief and were not properly contested by Plaintiff.[1] Based upon this statement of facts and the administrative record in this case, the Court finds as follows:

1. In 1992, the Delaware Tribe of Indians undertook to have the Assistant Secretary-Indian Affairs review the actions taken by an official in the Department in 1979. AR 6 0002.

2. The 1979 position of the Department was that the 1958 bylaws of the Delaware Tribe did not establish "a relationship with the Federal Government separate from that of the Cherokee Nation." AR 1 0105.

3. The 1979 position did not include an analysis of the historical direct government-to-government dealings with the Delaware Tribe. AR 1 0100-106.

1. The Court notes that Plaintiff did not controvert the Federal Defendants' statement of facts in the manner prescribed by the Local Rules. Moreover, at the hearing on January 25, 2002, Plaintiff did not challenge Defendants' statement of facts. Only later, on January 29, 2002, did Plaintiff undertake to contest Defendants' statement of facts. This filing, however, was both untimely and not in compliance with the Local Rules. Accordingly, this filing (Docket No. 110) is hereby stricken.

4. The Department followed the 1979 position until 1996. AR 1 0008.

5. On February 23, 1993, the Office of Tribal Services, Bureau of Indian Affairs, requested the Associate Solicitor, Indian Affairs, to provide an opinion concerning "Delaware-Cherokee relations." AR 6 0003.

6. In 1994, the Delaware Tribe submitted a revised document to the Department of the Interior entitled "A Lesson in Administrative Termination: An Analysis of the Legal Status of the Delaware Tribe of Indians." AR 2 0002 *et seq.*

7. In response to receiving this Delaware Tribe submission, the Cherokee Nation presented its position to the Department on September 6, 1994. AR 6 0018.

8. Following a preliminary review of the documents submitted and a preliminary review of additional files at the Department, including documents submitted previously by the Cherokee Nation, the Acting Associate Solicitor, Indian Affairs, requested the Cherokee Nation to submit any additional information that it wanted the Department to consider. AR 6 0062.

9. The Cherokee Nation, on July 19, 1995, submitted additional comments: "The Legal Status of the Delawares vis a vis Cherokee Nation." AR 3 0002 *et seq.*

10. The Associate Solicitor, Indian Affairs, prepared a memorandum to the Assistant Secretary, Indian Affairs, dated June 19, 1996. AR 1 0007 *et seq.*

11. The Associate Solicitor's memorandum included an analysis of the historical documents, administrative practice, and all comments submitted by the Delaware Tribe and Cherokee Nation. AR 1 0007 *et seq.*

12. The memorandum concluded that the position taken in 1979 should be reconsidered because independent government-to-government dealings with the Delaware Tribe "more accurately reflects the appropriate legal interpretation of the treaties and agreements from the 1860's and more accurately reflects the bulk of the administrative practice." AR 1 0008.

13. The Assistant Secretary, Indian Affairs, approved the Associate Solicitor's memorandum on June 26, 1996. AR 1 0006.

14. On June 27, 1996, the *Federal Register* published notice of the Assistant Secretary, Indian Affairs', proposed decision to retract "the position of the Department stated in the 1979 letter," because that position "did not consider the entire relevant legal record and did not construe accurately the provisions of the 1866 Treaty with the Delaware and the 1867 Agreement between the Delaware and Cherokee." AR 1 0004.

15. The Assistant Secretary, Indian Affairs, accepted comment on this proposed action. AR 1 0004.

16. Public comment was submitted but none of the comments addressed the analysis presented in the Assistant Secretary's preliminary decision. AR 1 0117 *et seq.*

Appendix B

17. The Cherokee Nation's comment was slightly over one page in length and stated that "if the Delawares can concede that their actions will not result in any diminishment of the Cherokee Nation's present funding, its service area or jurisdictional base then separate recognition would be agreeable to the tribe." The Cherokee Nation did not object to the analysis presented in the Assistant Secretary's preliminary decision and did not suggest an alternative analysis. AR 1 0118-19.

18. On September 23, 1996, the Assistant Secretary decided that based on the comprehensive legal review conducted by the Division of Indian Affairs, and based on a review of the comments received from the public, the Department would retract the position taken by the Department in 1979 and restore direct dealings with the Delaware Tribe of Indians. The Department would continue its government-to-government dealings directly with the Delaware Tribe of Indians. The Assistant Secretary gave notice that the Delaware Tribe of Indians was a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe. AR 1 0110 *et seq.*

19. The Assistant Secretary's decision addressed each of the public comments received. AR 1 0110-11.

20. The Assistant Secretary found that "there is nothing in these comments which indicates that the basis of the proposed decision is in error or that the legal analysis of June 19, 1996, includes errors or is incomplete. These comments, therefore, do not merit a change in the proposed decision." AR 1 0111.

21. The Assistant Secretary concluded that the Delaware Tribe of Indians "will have the same rights to demand consultation and contracting as other tribes. As a separate sovereign the Delaware Tribe of Indians will have the same legal rights and responsibilities as other tribes, consistent with federal law, both as to jurisdiction and as to its rights to define its membership." AR 1 0111.

22. The Assistant Secretary concluded that "[t]his decision in effect clarifies the government-to-government relationship between the United States and the Delaware Tribe of Indians which was understood to exist before the May 1979 letter." AR 1 0111.

23. The Assistant Secretary provided that "[t]he notice of proposed decision, 61 FR 33534, is hereby made final." AR 1 0111

24. Notice of the decision was published in the *Federal Register*, 61 Fed.Reg. 50, 862 (Sept. 27, 1996). AR 1 0110-11.

II

At the outset, the Court must determine whether, and to what extent, deference to the Secretary's decision to withdraw the 1979 letter is appropriate. It is settled law that when Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-844 (1984), and any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance,

or manifestly contrary to the statute. *See id.* at 844; *United States v. Morton*, 467 U.S. 822, 834 (1984); Administrative Procedures Act ("APA"), 5 U.S.C. §§ 706(2)(A), (D) (1996). But whether or not an agency enjoys an express delegation of authority on a particular question, an agency charged with applying a statute necessarily makes all sorts of interpretive choices, and, while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' " *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)), and "[the Supreme Court has] long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." *Chevron*, 467 U.S. at 844 (footnote omitted); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care,[2] its consistency,[3] formality, and relative

2. *See, e.g., General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (courts consider the "'thoroughness evident in [the agency's] consideration'" (quoting *Skidmore*, 323 U.S. at 140)).

3. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").

expertness,[4] and to the persuasiveness of the agency's positions. *See Skidmore*, 323 U.S. at 139-140. The approach has produced a spectrum of judicial responses, from great respect at one end, *see, e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984) (giving "'substantial deference'" to administrative construction), to near indifference at the other, *see, e.g., Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988) (evaluating an interpretation advanced for the first time in a litigation brief). As Justice Jackson stated:

> The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140.

In *Chevron*, the Court recognized that Congress not only engages in express delegation of specific interpretive authority, but that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." 467 U.S. at 844. Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet, it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be

4. *See, e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984).

able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. *Id.* at 845. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, *see id.* at 845-846, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable, *see id.* at 842-845; cf. 5 U.S.C. § 706(2) (a reviewing court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

The Supreme Court has recognized that a good indicator of delegation meriting *Chevron* treatment is express congressional authorization to engage in the process of rulemaking or adjudication. *Cf. EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (no *Chevron* deference to agency guideline where congressional delegation did not include the power to " 'promulgate rules or regulations' ") (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976)). It is fair to assume generally that Congress contemplates administrative action with the effect of law where, as here, the agency provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) (noting the deference due to actions taken

pursuant to APA notice-and-comment procedures "designed to assure due deliberation"). Thus, a significant majority of cases applying *Chevron* deference have reviewed administrative actions resulting from notice and comment proceedings.[5]

Before according *Chevron* deference, the Court must first determine whether "Congress delegated authority to the agency generally [to make such determinations] carrying the force of law," and whether "the agency interpretation claiming deference was promulgated in the exercise of [that] authority." *United States v. Mead Corp.*, 533 U.S. 218 (2001).

In the instant case, it is clear that Congress has delegated broad authority to the Department to manage "all Indian affairs and . . . all matters arising out of Indian relations," as well as authority to promulgate regulations having the force and effect of law.[6] The 1866 Treaty with the Cherokee,

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5. The Court notes that in the present case, Plaintiff was given notice and opportunity to be heard prior to the Secretary's final decision to retract the 1979 letter. While this is not formal administrative rulemaking, the principles of fairness and deliberation apply to the instant process with equal force.

6. *See* 25 U.S.C. § 1 (establishing position of Commissioner of Indian Affairs within the Department of Interior), § 2 (delegating to Commissioner of Indian Affairs "the management of all Indian affairs and of all matters arising out of Indian relations"), § 9 (delegating to the President the power to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs"); *see also Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57 (2d Cir. 1994) (surveying history

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the 1867 Agreement, and the statutes and regulations relied on by the Cherokee Nation in its Amended Complaint all explicitly concern or regulate Indian affairs. The Department's interpretation of these authorities therefore "come[s] within the area of Indian affairs and relations," and may be entitled to *Chevron* deference. *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158, 1165 (N.D. Ind. 1995) (quotation omitted).

Chevron requires a two-step analysis: first, the Court must determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If not, the Court must then examine whether the agency's interpretation is reasonable and consistent with the purposes of the law. *Id.* at 844-45. If the authority under scrutiny is ambiguous and the agency's interpretation is reasonable, the agency's interpretation *must* be accepted. *Id.* at 842-844; *see also Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000) (noting that "[i]n *Chevron*, we held that a court *must* give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute" (emphasis added)).

The Court notes that the Tenth Circuit has held that the canon of construction that ambiguities are to be resolved in favor of Native Americans controls over the deference otherwise afforded administrative agencies under *Chevron*.

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of Congressional delegation of power to administer Indian affairs to executive branch); 43 U.S.C. § 1457 (charging the Secretary with the supervision of public business relating to Indians). More recently, much of the Secretary's authority for the conduct of federal Indian policy has been delegated to the Assistant Secretary of Indian Affairs. *See* 209 Dept. Manual 8.1.

See Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997). However, the Tenth Circuit and other courts have also held that this canon is inapplicable when "the [competing] interests at stake both involve Native Americans."[7] Thus, this canon of construction is inapplicable here because the instant case involves judicial review of a Federal agency decision that hinged in part on the interpretation of Federal laws and a federally-approved agreement affecting competing Native American interests.

In addition to *Chevron* deference, the Secretary's interpretations are also entitled to consideration for deference under *Skidmore*. The deference afforded agency interpretations and decisions under *Skidmore* is separate and distinct from *Chevron* deference. As the Supreme Court recently clarified, "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires. . . ." *Mead Corp.*, 533 U.S. at 234 (quotation omitted).

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7. *See Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995) (*citing Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) ("[This] canon has no application here; the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members.")); *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) ("The government owes the same trust duty to all tribes, including the Quinault. . . . We cannot apply the canons of construction for the benefit of the [Chehalis Tribe] if such application would adversely affect Quinault interests.")

Appendix B

III

The above authorities make clear that some degree of deference is appropriate in this case. The extent of such deference, however, must be measured by the fact that Defendants are seeking to retract of a position previously announced in 1979. Indeed, Plaintiff argues that the Secretary's change of position in this case should preclude any deference whatsoever.

It is well-settled that *Chevron* deference does not control where an agency's interpretation of its regulations is inconsistent with its own prior administrative interpretations. *Shoshone Indian Tribe v. Hodel*, 903 F.2d 784, 787 (10th Cir.1990); *cf. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Moreover, "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis. . . ." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971).

In the instant case, the Acting Deputy Commissioner of the Bureau of Indian Affairs effectively declared in 1979 that the Department would no longer deal directly with the Delaware Tribe "[f]or governmental purposes" and that thereafter "[o]ur government-to-government relationship is

with the Cherokee Nation which has within its membership the Cherokee Delaware Tribe." Based upon a review of the record, the Court finds that this declaration dramatically changed the nature of the dealings then in effect between the United States and the Delaware Tribe.

The 1979 letter was striking both for the superficiality of its analysis and for the sweeping impact of its conclusions. Furthermore, the 1979 letter was issued without notice and opportunity to be heard. Finally, the 1979 letter was a change in prior practice, yet it advanced no reasoned basis for its conclusions. *See Motor Vehicle Mfrs. Assoc. of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). Indeed, the Court finds that had the 1979 letter been challenged in court, this action by the Department would not have been entitled to any deference whatsoever.

The process by which the 1979 letter was issued (as opposed to its substance) informs the Court's perspective on its current review of the Secretary's decision to retract the 1979 letter. As noted above, the Secretary now seeks to retract a letter which this Court believes was entitled to no deference under applicable law. Accordingly, the issue is not the same as a change of course in which deference is diminished because a previous decision, carefully considered and properly crafted, is being reversed. *See Shoshone Indian Tribe*, 903 F.2d 784. To the contrary, the Secretary here seeks to retract a manifestly flawed declaration of policy issued without regard to legally mandated deliberation and proper procedural safeguards. Simply stated, retracting a capricious action and thereby restoring the *status quo ante* is different from retracting a prior decision that was fully considered

and properly developed. Accordingly, with respect to the Secretary's decision to retract the 1979 letter, the Court finds that substantial deference under *Chevron* is appropriate.

This finding, however, does not end the analysis. The question becomes whether granting substantial deference to the Secretary's decision to retract the 1979 letter in fact resolves the issue of whether the notice issued by the Secretary on September 27, 1996, with respect to relations between the United States and the Delaware Tribe was in accordance with law.

IV

At the outset, the Court notes that the action by the Secretary at issue here may involve more than the mere retraction of the 1979 letter. Specifically, the notice dated September 27, 1996, provides in applicable part as follows:

> . . . the Assistant Secretary hereby retracts the letter of May 24, 1979. The notice of proposed decision, 61FR33534, is hereby made final. Notice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

Thus, the Assistant Secretary first retracted the 1979 letter and, second, declared the Delaware Tribe a "recognized" tribal entity, "eligible for funding and services from the Bureau . . . by virtue of its status as an Indian tribe." Clearly, the former of these actions retracts the 1979 letter and restores

the relationship between the Department and the Delaware to the *status quo ante*. The latter of these actions, however, potentially may constitute a declaration of new substantive policy. The Court will address each of these actions in turn.

A.

By the notice dated September 27, 1996, the Secretary expressly retracted the 1979 letter. A careful analysis of the 1979 letter and the circumstances surrounding its issuance makes clear why the Court should give substantial deference to this decision.

The 1979 letter is part of a series of letters arising out of an appeal dated October 4, 1977, of the Muskogee Area Director's approval of a plan to use certain program funds available to the Delaware Tribe of Oklahoma. The Assistant Secretary sent a response to that appeal on February 26, 1979, along with the 1979 letter. The 1979 letter contains five numbered paragraphs which purport to represent a "summary of our positions taken in those letters concerning the Cherokee Delaware Indians." Each of the five numbered paragraphs is set forth below and is followed by an analysis of its contents:

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1. Based on the 1867 Agreement and related statutes, the Cherokee Delawares are a tribe within the Cherokee Nation. They are Cherokee citizens with the same responsibilities and privileges as other citizens of the Cherokee Nation.

At the outset, it is noteworthy that all parties agree the status of the Delawares does not result from the 1867 Agreement, which was identified as controlling authority in the 1979 letter, but rather from the 1866 Treaty. Moreover, other than the improper identification of the 1867 Agreement, the 1979 letter cited no specific statute or other authorities for support. Furthermore, the statement insofar as it refers to the 1866 Treaty with the Cherokee, is not controverted by either Plaintiff or Defendants in the instant case. To the contrary, all parties agree that under Article 15 of the 1866 Treaty with the Cherokee, the Delawares are either "on equal terms in every respect with native citizens" (so-called "Option One") or entitled to "enjoy all the rights of native Cherokees" (so-called "Option Two").[8] Therefore, the

8. As detailed in Plaintiff's papers, Article 15 of the 1866 Treaty with the Cherokee provides two separate options available to "civilized Indians, friendly with the Cherokees and adjacent tribes" if settled by the United States "within Cherokee country": first, for "any such tribe or band of Indians" who "abandon their tribal organization" they "shall be incorporated into and ever after remain a part of the Cherokee nation, *in equal terms in every respect with native citizens"* (emphasis added) (so-called "Option One"); and, second, for "any such tribe" that "decide to preserve their tribal organization, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the 'Cherokee

(Cont'd)

description in this letter of Delawares as "Cherokee citizens with the same responsibilities or privileges as other citizens of the Cherokee Nation" has no substantive effect on the instant dispute.

> **2. The Cherokee Delawares may deal with their judgment awards and preserve their Delaware heritage and identity. For *governmental* purposes, however, they must look to the Cherokee Nation, of which they are an integral part.** (Emphasis in original).

This paragraph contains the most significant description of the status of the Delaware Tribe, asserting that "for *governmental* purposes" the Delawares "must look to the Cherokee Nation, of which they are an integral part."

The parties do not contest that the Delawares are an "integral" part of the Cherokee Nation.[9] For the same reasons described above with respect to paragraph one, this fact is true whether Option One or Option Two of the 1866 Treaty applies.

(Cont'd)

Nation, . . .'" there is a separate treatment (so-called "Option Two"). Under Option Two, "such tribe thus settled" shall "thence afterwards . . . *enjoy all the rights of native Cherokees.*" (emphasis added). Thus, under both Option One *and* Option Two, the tribe has effectively "the same responsibilities and privileges as other citizens of the Cherokee Nation."

9. The term "integral" is defined in Black's Law Dictionary as follows: "Term in ordinary usage means part or constituent component necessary or essential to complete the whole."

More importantly, the Court finds that there is nothing in the 1979 letter, the circumstances leading up to its issuance, or the record, that forms a basis for the assertions in paragraph two. Specifically, the 1979 letter contains no authorities and offers no analysis in support of its conclusion. Further, no opportunity for review and comment was provided to interested parties.

Finally, the Court observes that the language in this paragraph two of the 1979 letter to the effect that the Delawares may "preserve their Delaware heritage and identity," is evocative of the rights afforded under Option Two of the 1866 Treaty, which contemplates preservation of government-to-government relations with the United States—rather than Option One, which does not.

3. **The existing organizational structure, set forth in the 1958 bylaws, as amended, is *not* capable of adequately protecting the interests of the Cherokee Delaware people, as required by the 1972 Judgment Fund Legislation (86 Stat. 762). Our research has shown that the 1958 bylaws was adopted for the purpose of pursuing claims against the Federal Government relating to the period before the Delawares became part of the Cherokee Nation. Due to misunderstandings about the nature of that document, some have felt that organization, established for the Delawares a relationship with the Federal Government separate from that of the Cherokee Nation; such is not the case.** (Emphasis in original).

This paragraph traces back to an action taken in 1958, "for the purpose of pursuing claims against the Federal Government relating to the period before the Delawares became part of the Cherokee Nation." This relatively recent action, taken only 21 years prior to the issuance of the 1979 letter, without any historical context, clearly cannot support the claim that the Delaware Tribe's government-to-government relations with the United States for nearly 200 years should be similarly characterized as relating exclusively to pursuing claims against the United States. Moreover, this paragraph does not contain any citations to the Assistant Secretary's purported "research" and refers to "misunderstandings" as a result of which "some have felt that organization [set forth in the 1958 bylaws] established for the Delawares a relationship with the Federal Government separate from that of the Cherokee Nation." The paragraph

concludes, without any analysis whatsoever, with the bare declaration "such is not the case." There is absolutely nothing in this paragraph to suggest that the Secretary's 1996 decision to retract the 1979 letter should not receive substantial deference.

> **4. No consideration will be given to any proposals for the use of funds resulting from Dockets 72/ 298 or proceeds from awards appropriated since 1972, until there is established an entity that meets the requirements of the above cited Act, as determined by this office.**

This statement merely sets forth a proposed course of action based on the Assistant Secretary's conclusions, and therefore no substantive analysis by the Court is required.

> **5. Upon our approval of a new organizational document, proposals for the use of all judgment funds remaining to the credit of the tribe, must first be adopted, either by the adult membership or some entity which may be specifically empowered by the new organizational document to act on such matters.**

This paragraph likewise merely sets forth a proposed course of action based on the Assistant Secretary's conclusions and therefore no substantive analysis by the Court is required.

In light of the above, the Court finds that the Secretary's decision to retract each of these five numbered paragraphs, which together form the basis of the position articulated by

the Secretary in the 1979 letter, should receive substantial deference by the Court because each paragraph fails to cite any supporting facts or law whatsoever for the assertions and conclusions contained therein.

Based on these five paragraphs, the 1979 letter proceeds with two additional paragraphs. Specifically, the 1979 letter provides:

> **In view of our positions summarized above and the failure to achieve an organizational committee, I hereby withdraw the Bureau's approval of the 1958 Delaware Bylaws, as amended. Further, I am withdrawing our recognition of those officials elected or appointed pursuant to the bylaws. Our direct dealings with the Cherokee Delaware Indians is only for purposes of claims matters. *Our government-to-government relationship is with the Cherokee Nation which has within its membership the Cherokee Delaware Tribe.***
>
> **Until there can be established an appropriate entity to speak on behalf of the Delawares within the Cherokee Nation for claims purposes, we will deal with the adult membership in carrying out our responsibilities in these matters. Accordingly, I plan to promptly issue a letter to the adult Delawares within the Cherokee Nation telling them of the status of pending issues and inviting them to a meeting of that group to be held in Tulsa, Oklahoma during the latter part of July.** (Emphasis added).

The effect of these two paragraphs is to declare, based on the numbered paragraphs cited above that there will be no further government-to-government relations between the United States and the Delaware Tribe.

The Court finds that the 1979 letter, relying on actions taken in 1958, fails to analyze, or even cite, any legal authorities which support such a sweeping change in policy. Further, such declaration of new policy was announced without regard to proper procedural safeguards. Therefore, the Court finds that the 1979 letter was both substantively and procedurally infirm. The Secretary's decision to retract the 1979 letter, therefore, is entitled to substantial deference. Applying this standard of deference, the Secretary's decision to retract the 1979 letter is hereby sustained.

B.

As noted previously, the Secretary's notice issued September 27, 1996, arguably encompasses two decisions: first, a decision to retract the 1979 letter and, second, a decision to declare a new policy with respect to the status of the Delaware Tribe and relations between the Delaware Tribe and the United States. As stated above, the Court hereby sustains the Secretary's decision to retract the 1979 letter and thereby to restore the *status quo ante*. The question becomes whether the Secretary's notice on September 27, 1996, also effected a substantive change in the *status quo ante* and, if so, whether that change is justified as a matter of law.[10]

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10. The notice published in the Federal Register on June 27, 1996, states in applicable part that ". . . the Assistant Secretary has

(Cont'd)

Appendix B

The Court finds that the briefs to date have not adequately separated the issue of retraction of the 1979 letter from the issue of whether the 1996 notice altered the policy of the United States in place prior to the issuance of the 1979 letter (and if so, in what way and on what basis).

Based upon the above, the Court orders as follows:

1. The Secretary's decision of September 27, 1996, insofar as it retracts the 1979 letter is hereby sustained.

2. The parties shall brief the issue of whether the notice of September 27, 1996, goes beyond the mere retraction of the 1979 letter and reinstatement of the *status quo ante* in effect prior to the issuance of the 1979 letter.

3. Assuming *arguendo* the 1996 letter announces a new substantive policy toward the Delaware Tribe compared to that in effect prior to the issuance of the 1979 letter, the parties shall further brief the issue of whether the law supports such a change in policy.

(Cont'd)

made a preliminary determination that the position of the Department stated in the 1979 letter should be retracted." The notice provides that "[t]he public has until July 29, 1996 to comment on this preliminary decision." The notice gives no indication that the proposed action of the Secretary was anything more than a retraction of the 1979 letter. By comparison, the notice published in the Federal Register on September 27, 1996, states in applicable part "the Assistant Secretary hereby retracts the letter of May 24, 1979[,]" and states further that "[n]otice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian Tribe."

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The parties shall file simultaneous briefs with respect to the issues identified in paragraphs 2 and 3 above not later than August 19, 2002, and shall file simultaneous response briefs not later than September 9, 2002.

IT IS SO ORDERED.

Dated this 23rd day of July, 2002.

s/ Sven Erik Holmes
Sven Erik Holmes
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AND FILED DECEMBER 20, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 98-CV-903-H

CHEROKEE NATION OF OKLAHOMA,
on behalf of all its members,

Plaintiff,

v.

Gale NORTON, in her official capacity as Secretary of Interior of the United States Department of Interior; NEAL McCALEB, in his capacity as Assistant Secretary of the Department of the Interior; and THE DELAWARE TRIBE OF INDIANS, as an indispensable party pursuant to Federal Rule of Civil Procedure 19,

Defendants.

ORDER

This matter comes before the court on an appeal by Plaintiff Cherokee Nation of Oklahoma (the "Cherokee") of a decision by the Secretary of Interior (the "Secretary") in 1996 to withdraw a letter issued by an official of the Department of Interior (the "Department") in 1979 (the "1979 letter"). The effect of such withdrawal was to re-establish certain dealings between the United States and the Delaware Tribe of Indians (the "Delaware").

Appendix C

I

On July 23, 2002, this Court entered an order sustaining the Secretary's decision to retract the 1979 letter (the "Order"). The basis for this decision is set forth fully in the Order, which the Court hereby incorporates herein by reference. In sustaining the Secretary's decision to retract the 1979 letter, the Court also sustained the Secretary's decision to return to the *status quo ante* prior to the issuance of the 1979 letter. However, the Court raised the question whether the Secretary's final decision on September 27, 1996, which included a statement that the Delaware is a tribal entity recognized and eligible for funding, went beyond a mere return to the *status quo ante* and actually announced a new substantive policy. In the Order, the Court explained this as follows:

> At the outset, the Court notes that the action by the Secretary at issue here may involve more than the mere retraction of the 1979 letter. Specifically, the notice dated September 27, 1996, provides in applicable part as follows:
>
> > . . . the Assistant Secretary hereby retracts the letter of May 24, 1979. The notice of proposed decision, 61FR33534, is hereby made final. Notice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

> Thus, the Assistant Secretary first retracted the 1979 letter and, second, declared the Delaware Tribe a "recognized" tribal entity, "eligible for funding and services from the Bureau . . . by virtue of its status as an Indian tribe." Clearly, the former of these actions retracts the 1979 letter and restores the relationship between the Department and the Delaware to the *status quo ante.* The latter of these actions, however, potentially may constitute a declaration of new substantive policy. The Court will address each of these actions in turn.
>
> * * *
>
> As noted previously, the Secretary's notice issued September 27, 1996, arguably encompasses two decisions: first, a decision to retract the 1979 letter and, second, a decision to declare a new policy with respect to the status of the Delaware Tribe and relations between the Delaware Tribe and the United States. As stated above, the Court hereby sustains the Secretary's decision to retract the 1979 letter and thereby to restore the *status quo ante.* The question becomes whether the Secretary's notice on September 27, 1996, also effected a substantive change in the *status quo ante* and, if so, whether that change is justified as a matter of law.

(07/23/02 Order at 13, 18-19.)

Based on the above-described concern with respect to the impact of the retraction of the 1979 letter, the Court ordered

additional briefing on the question of whether the final decision of the Secretary, which included the statement regarding the recognition of the Delawares as a tribal entity eligible for funding, announced a new substantive policy.[1]

Thus, the remaining question before the Court is whether the Secretary correctly determined that the *status quo ante*, prior to the issuance of the 1979 letter, was as follows: "[T]he Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian Tribe." If so, the Secretary's final decision in September of 1996 did not constitute a declaration of new policy and therefore did not effect a substantive change in the *status quo ante*. The Delaware and the Secretary argue that the Secretary's determination of the *status quo ante* prior to the issuance of the 1979 letter should be upheld. For the reasons set forth below, the Court agrees.

---

1. In this regard, the Court observes that the initial notice published in the Federal Register on June 27, 1996, states in applicable part that "the Assistant Secretary has made a preliminary determination that the position of the Department stated in the 1979 letter should be retracted." The initial notice provides that "[t]he public has until July 29, 1996 to comment on this preliminary decision." By comparison, the final decision published in the Federal Register on September 27, 1996, states in applicable part that "the Assistant Secretary hereby retracts the letter of May 24, 1979[,]" and further states that "[n]otice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian Tribe."

Appendix C

II

As noted above, the issue currently before the Court is the Secretary's determination that, pursuant to a return to the *status quo ante*, "the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services." The scope of a district court's review of an administrative agency decision is governed by section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.* Section 706 of the APA provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under the APA, we review agency action de novo to determine whether it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996) (quoting section 706(2)(A) of the APA). The "essential function" of judicial review of an agency action is "a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). Under the arbitrary and capricious standard, the objective of the Court's inquiry is to determine "whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

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III

At the outset, the Court finds that the Secretary is entitled to great deference in her determination that, prior to the issuance of the 1979 letter, the Delaware was a federally recognized sovereign entity entitled to direct government relations with the United States. The authorities supporting such deference were discussed at length in the Order and will not be rehearsed here. The Court finds that other authorities also compel the Court to resolve any question in favor of the Secretary's determination in this case.

It is well settled that issues involving government-to-government relations with Indian tribes are political questions inappropriate for judicial decision. As stated by the Supreme Court in *United States v. Holliday*, 70 U.S. 407, 419 (1865), "It is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same." In *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913), the Supreme Court limited this judicial deference, but only in situations in which the government acted arbitrarily in declaring a community or body of people an Indian tribe.

Similarly, the Court in *Baker v. Carr*, 369 U.S. 186 (1962), noted that cases questioning the status of Indian tribes are "representative" of political controversies sometimes inappropriate for judicial resolution, but that courts could strike down any "heedless extension" of that label. *Id.* at 216-17. As stated in Felix Cohen's *Handbook of Federal Indian*

Law, "[T]he courts have said that it is up to Congress and the Executive to determine whether a tribe exists." Felix Cohen, *Handbook of Federal Indian Law*, at 268 (1942). *See also Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition."); *Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997) ("Whether a group constitutes a 'tribe' is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment."). This line of authority showing deference to actions of the executive with respect to Indian tribes directly applies to the Secretary's 1996 reconsideration, after notice and comment, of the Secretary's 1979 position in light of the historical government-to-government relationship between the United States and the Delaware until 1979.

IV

The Court finds not only that the Secretary's determination is entitled to deference, but also that it has ample support in the law. The Cherokee rely heavily on *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904). Citing these cases, the Cherokee assert that, under the 1867 Agreement, the Delaware elected to proceed in accordance with "Option 1" of Article 15 of the 1866 Treaty and therefore have abandoned their tribal organization. The Court finds that the Cherokee's reliance on these cases is misplaced. As the D.C. Circuit stated in *Cherokee Nation v. Babbitt*, "Neither *Journeycake* nor *Delaware Indians* explicitly

expressed whether the Delaware settled in Cherokee territory pursuant to the first or second provision of Article 15." *Cherokee Nation v. Babbitt*, 117 F.3d at 1500.

Instead, the Court directs its attention to more recent authority, specifically the 1972 Appropriations Act, 25 U.S.C. § § 1291-1297 ("1972 Appropriations Act"), and the Supreme Court's decision in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). The Court finds that these authorities provide a more sound legal basis than the two cases cited by the Cherokee for determining the *status quo* prior to the issuance of the 1979 letter.

In October of 1972, Congress passed the 1972 Appropriations Act, an act appropriating funds to the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma to satisfy an Indian Claims Commission award. *See* 25 U.S.C. § § 1291-1297; AR vol. II, at 0205. The 1972 Appropriations Act provides, in pertinent part:

> The funds . . . shall be placed to the credit of the *Delaware Tribe of Indians* in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to subsection 2(c)(1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested *for any purpose that is authorized by the tribal governing body: Provided*, That the Secretary of

> the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

25 U.S.C. § 1294(b); AR vol. II, at 0059-60 (emphasis added). Following passage of the 1972 Appropriations Act, the Bureau of Indian Affairs ("BIA") reviewed the 1958 Bylaws and recommended that the Tribe adopt membership criteria to comply with the distribution requirements of the Act.[2] AR vol. II, at 0060. In a General Council meeting, the Delaware Tribe amended its bylaws to include such criteria, and the BIA approved the amendments on September 30, 1974. *Id.* In 1975, the BIA certified that the Delaware Tribe's amended bylaws provided "the legal entity which in the judgment of the Secretary of Interior adequately protects the interest of the Delaware Tribe of Indians pursuant to the [1972 Appropriations Act]." AR vol. IV, at 0076.

In 1977, the Supreme Court explicitly and unambiguously declared that the Delaware Tribe of Indians

---

2. Following passage of the 1972 Appropriations Act, the BIA was unable to locate the 1958 Bylaws in its files. This caused some confusion on the part of the BIA as to whether the Tribe had sufficient governmental organization to distribute the funds in accordance with the 1972 Appropriations Act. However, in 1974, the BIA informed the Tribe that "[w]e have since located the file . . . and find that it was approved by the [BIA]. The Delaware Tribal Business Committee . . . would appear to meet the requirement found in the [1972 Appropriations Act] . . . that a legal entity exist that adequately protects the interests of its members." AR vol. I, at 0023-24; *see also id.* vol. II, at 0060-61.

was a federally recognized Indian tribe in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). *Weeks* involved claims by an unorganized group of Delaware descendants, the "Kansas Delawares," who were challenging the constitutionality of the 1972 Appropriations Act. The Kansas Delawares were descendants of those Delaware Indians who chose to remain in Kansas under Article 9 of the 1866 Delaware Treaty by "dissolv[ing] their relations with the tribe and becom[ing] citizens of the United States." *Id.* at 78. The Kansas Delawares alleged that their exclusion from the 1972 Appropriations Act resulted in the denial of equal protection in violation of the Due Process Clause of the Fifth Amendment. The Kansas Delawares argued that the Delaware Tribe of Indians was recognized only for claims purposes. The BIA argued that the Delaware Tribe of Indians was a federally recognized tribe for all purposes and that, under the 1867 Articles of Agreement, the Delaware Tribe was permitted and did "maintain their tribal laws, customs, and usages." AR vol. II, at 0047-48. The Supreme Court held, in an 8-1 decision, that the 1972 Appropriations Act was constitutional with respect to the Delaware Tribe of Indians and further held that "[d]espite their association with the Cherokees, these Indians, called the 'Cherokee-Delawares' in this suit, have over the years maintained a distinct group identity, *and they are today a federally recognized tribe.*" *Weeks*, 430 U.S. at 77 (emphasis added).

Appendix C

V

The Court finds it unnecessary to consider further the long history of relations between the Cherokee and the Delaware. The question is whether the Secretary effected a substantive change in the *status quo ante* in stating that the Delaware is a federally recognized sovereign tribe. The Court finds that the Secretary did not effect such a substantive change. The Secretary, who is entitled to great deference, has determined that, as a result of the withdrawal of the 1979 letter and return to the *status quo ante*, the Delaware is a federally recognized sovereign tribe. The Congress has acted in a manner consistent with this determination. The Supreme Court has declared the Delaware to be a federally recognized sovereign tribe. These actions and authorities properly control the Court's decision here.

Applying principles of deference and the arbitrary and capricious standard of review, the Court hereby sustains the decision of the Secretary in this case. Notice of this decision, published in the Federal Register on September 27, 1996, is hereby upheld in all respects. Accordingly, the Court finds that, pursuant to the Secretary's withdrawal of the 1979 letter and the return to the *status quo ante*, the Delaware Tribe of Indians is a federally recognized sovereign tribe.

IT IS SO ORDERED.

This 20th day of December, 2002.

s/ Sven Erik Holmes
Sven Erik Holmes
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED FEBRUARY 16, 2005

UNITED STATES COURT OF APPEALS — FOR THE TENTH CIRCUIT

No. 03-5055

CHEROKEE NATION OF OKLAHOMA,
on behalf of all its members,

Plaintiff-Appellant,

v.

GALE NORTON, Secretary of the United States Department of the Interior; AURENE MARTIN, Acting Assistant Secretary of the United States Department of the Interior; and DELAWARE TRIBE OF INDIANS,

Defendants-Appellees.

ORDER

Filed February 16, 2005

Before **SEYMOUR**, **BALDOCK** and **HARTZ**, Circuit Judges.

The matter is before the Court on the Federal Appellees' petition for panel rehearing. The Cherokee Nation has filed

a response. Upon consideration of these pleadings, we grant the petition for the limited purpose of striking the sentence on page 25 of the original decision which states, "[a]ny action taken on the agency's 1996 final decision is void[]" and replacing it with the following sentence designated here in bold:

"Any action taken by the agency on its 1996 final decision is void." The petition for rehearing is otherwise denied. An amended version of the court's opinion is attached to this order and shall stand as a substitute to the decision issued originally on November 16, 2004.

Entered for the Court
PATRICK FISHER, Clerk of Court

by s/ Amy Frazier
Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR PANEL REHEARING FILED JANUARY 11, 2005

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 03-5055

(D.C. No. 98-CV-903-H)
(N.D. Okla.)

CHEROKEE NATION OF OKLAHOMA,

Plaintiff-Appellant,

v.

GALE NORTON, Secretary of the Interior, AURENE MARTIN, Acting Assistant Secretary of the Interior, and the DELAWARE TRIBE OF INDIANS,

Defendants-Appellees.

ORDER
Filed January 11, 2005

Before **SEYMOUR**, **BALDOCK**, and **HARTZ**, Circuit Judges.

The matter is before the Court on the Delaware Tribe of Indians' Petition for Panel Rehearing and the Federal Appellees' Petition for Panel Rehearing. It is hereby ORDERED that the Delaware Tribe of Indians' Petition for

Appendix E

Panel Rehearing is DENIED. It is further ORDERED, pursuant to Fed. R. App. P. 40(a)(3), that the Cherokee Nation of Oklahoma file an answer to the Federal Appellees' Petition for Panel Rehearing, addressing the sole issue of whether the panel majority erred when it ruled that "[a]ny action taken on the agency's 1996 decision is void." The Cherokee Nation of Oklahoma's answer shall be filed by January 21, 2005, and in accordance with Fed. R. App. P. 40(b).

Entered for the Court,

Bobby R. Baldock
Circuit Judge

APPENDIX F — FINAL DECISION TO RETRACT 1979 DECISION OF THE DEPUTY COMMISSIONER OF INDIAN AFFAIRS REGARDING THE DELAWARE TRIBE OF INDIANS DATED SEPTEMBER 23, 1996

BUREAU OF INDIAN AFFAIRS

Final Decision To Retract 1979
Decision of the Deputy Commissioner
of Indian Affairs Regarding the
Delaware Tribe of Indians

AGENCY: Bureau of Indian Affairs, Interior

ACTION: Notice of final decision.

SUMMARY: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs (Assistant Secretary) by 209 DM 8.

Based on a comprehensive legal review conducted by the Division of Indian Affairs, Office of the Solicitor, dated June 19, 1996, and based on a review of the comments received from the public, the Assistant Secretary hereby retracts the letter of May 24, 1979, in which the Bureau of Indian Affairs through the Acting Deputy Commissioner determined that the Department of the Interior would engage in government-to-government relations with the Delaware Tribe of Indians only through the Cherokee Nation and that the Department would deal directly with the Delaware Tribe of Indians only for purposes of their claims against the United States. Notice is hereby given that the Delaware Tribe of

Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

A Notice of Intent to Retract the 1979 Decision was published in the Federal Register on June 27, 1996 (61 FR 33534, June 27, 1996). The public was given until July 29, 1996 to comment on the proposed decision. A copy of the June 19, 1996, legal review prepared by the Division of Indian Affairs was sent to the Cherokee Nation of Oklahoma and to the Delaware Tribe of Indians on June 21, 1996, inviting comments on the proposed decision to retract the May 24, 1979, letter. Copies of the legal review were sent also to the Chickasaw Nation of Oklahoma, Choctaw Nation of Oklahoma, Seminole Nation of Oklahoma, and Muscogee (Creek) Nation of Oklahoma.

Four letters containing public comments were received. Two of these letters included comments concerning the name of the tribe. The Federal Register notice of June 27, 1996 referred both to the "Delaware Tribe of Eastern Oklahoma" and to the "Delaware Tribe." By letter dated July 24, 1996, the Chief of the Delaware Tribe of Indians stated that although they had "been (unofficially) called 'The Delaware Tribe of Eastern Oklahoma' * * * our legal name is the *Delaware Tribe of Indians*." By letter dated July 28, 1996, the Delaware Tribe of Western Oklahoma expressed concern that the tribe might be called the "Delaware Tribe of Oklahoma," thereby causing confusion with the Delaware Tribe of Western Oklahoma. The Department has dealt with other tribes which have name similarities, as a review of the Federal Register list of "Indian Entities Recognized and Eligible to Receive

Services" demonstrates (60 FR 9250, Feb. 16, 1995). The comment in the July 24, 1996, letter is accepted and the Department will use the "Delaware Tribe of Indians" as the tribe's name.

The Delaware Tribe of Western Oklahoma expressed concern that this final status clarification action may prejudice its rights as a continuation of the Delaware Nation. In response, the Assistant Secretary directs attention to the June 16, 1996, legal review of the Division of Indian Affairs which states that the Delaware were the first Indians to enter into a formal treaty with the federal government and that over the years, the Delaware became divided into groups. The legal review notes specifically that one of these groups is the federally recognized tribe, the Delaware Tribe of Western Oklahoma. This final decision on the Delaware Tribe of Indians does not change the status, or history, of the Delaware Tribe of Western Oklahoma.

The comment from the Delaware Tribe of Western Oklahoma states that the treaties and agreements between the Delaware Nation and the United States, and the Cherokee Nation and the United States must be examined with precision, and that the final determination must address the issues of Delaware sovereignty rather than being a political determination. The June 19, 1996, legal review was such a comprehensive and detailed analysis of the relevant legal record, including a detailed evaluation of pertinent treaties and agreements. This comment raises no new information meriting additional analysis.

Appendix F

A comment was received from the Cherokee Nation dated July 25, 1996. This comment concerns the Cherokee Nation's jurisdictional service area, its court system, law enforcement, Indian child welfare services and civil jurisdiction. Referencing 105 Stat. 990 (1991) and 25 CFR 151.8, the tribe states that it cannot responsibly share its jurisdictional land base, and provides that if the Delawares "concede that their actions will not result in any diminishment of the Cherokee's present funding, its service area or jurisdictional base, then separate recognition would be agreeable to the tribe." A comment, by letter dated July 23, 1996, from an individual whose certificate of Indian blood identifies her as "Cherokee (adopted Delaware)," expressed concerns that the proposed decision did not contain language addressing the issues of dual enrollment and jurisdiction. This comment notes that the Delaware intend to prohibit dual enrollment, and that a driving force "is the acquisition and control of federal dollars."

The decision to retract the letter of May 24, 1979, is based on a comprehensive legal analysis of the pertinent treaties and agreements as well as a review of the Department of the Interior's administrative practice. Based on this review, the proposed decision published in the Federal Register concluded that the 1979 letter should be retracted because it was not consistent with federal law. Within the restraints imposed by federal law, the Delaware Tribe of Indians as a sovereign tribe will have the same rights to demand consultation and contracting as other tribes. As a separate sovereign, the Delaware Tribe of Indians will have the same legal rights and responsibilities as other tribes, consistent with federal law, both as to jurisdiction and as to its right to

define its membership. This decision in effect clarifies the government-to-government relationship between the United States and the Delaware Tribe of Indians which was understood to exist before the May 1979 letter. Although this decision may have legal consequences affecting the Cherokee Nation and the members of both tribes, there is nothing in these comments which indicates that the basis of the proposed decision is in error or that the legal analysis of June 19, 1996, includes errors or is incomplete. These comments, therefore, do not merit a change in the proposed decision.

Based on the legal analysis of the Division of Indian Affairs dated June 19, 1996, and based on the foregoing analysis of the comments received during the public comment period, the Assistant Secretary hereby retracts the letter of May 24, 1979. The notice of proposed decision, 61 FR 33534, is hereby made final. Notice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

By letter dated August 21, 1996, the attorney for the Delaware Tribe of Indians indicated that at meeting of April 30, 1996, the Delaware Chief was informally advised that after the 30-day comment period following the Federal Register publication, the Delawares would have the opportunity to respond to any negative comments submitted. The letter of August 21, 1996, included the Delaware response to the comments of the Cherokee Nation and Delaware Tribe of Western Oklahoma. The notice in the Federal Register did not include a right by the Delaware Tribe of Indians to respond to the public comments. The letter of

August 21, 1996, was reviewed and because it does not raise any new information or legal arguments pertinent to the basis of the proposed decision, the Assistant Secretary need not address whether the Delaware Tribe of Indians had a right to file this response even though none was provided for in the Federal Register notice.

Nothing herein should be construed as altering the powers and duties of the Delaware Trust Board.

Representatives from the Muscogee Area Office of the Bureau of Indian Affairs shall consult with the Delaware tribal officials and develop, in cooperation with the tribe, a determination of needs and recommended budget, including a determination of the tribal service population.

DATES: This decision is final for the Department and is effective September 23, 1996.

Dated: September 23, 1996.

Ada E. Deer,
Assistant Secretary—Indian Affairs.

APPENDIX G — PERTINENT EXCERPTS OF THE TREATIES WITH THE DELAWARES AND CHERIOKEES, 1866

TREATY WITH THE DELAWARES, 1866.

Articles of agreement between the United States and the chiefs and councillors of the Delaware Indians, on behalf of said tribe, made at the Delaware Agency, Kansas, on the fourth day of July, eighteen hundred and sixty-six.

* * *

Article 4. The United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasas, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of lands in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior.

Article 5. The United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife and civil

war, and a full and just participation in any general council or territorial government that may be established for the nations and tribes residing in said Indian country.

* * *

Article 11. The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the Government thereof, and ask its protection; and the United States agree to protect, preserve, and defend them in all their just rights.

TREATY WITH THE CHEROKEE, 1866.

Articles of agreement and convention at the city of Washington on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States, represented by Dennis N. Cooley, Commissioner of Indian Affairs, [and] Elijah Sells, superintendent of Indian affairs for the southern superintendency, and the Cherokee Nation of Indians, represented by its delegates, James McDaniel, Smith Christie, White Catcher, S. H. Benge, J. B. Jones, and Daniel H. Ross—John Ross, principal chief of the Cherokees, being too unwell to join in these negotiations.

* * *

Article 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal

organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve

the tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude.

APPENDIX H — PUBLIC LAW 103-454, TITLE I
NOVEMBER 2, 1994
108 STAT. 4791

Public Law 103-454
103d Congress

An Act

To provide for the annual publication of a list of federally recognized Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—WITHDRAWAL OF ACKNOWLEDGEMENT OR RECOGNITION

SEC. 101. SHORT TITLE.

This title may be cited as the "Federally Recognized Indian Tribe List Act of 1994".

SEC. 102. DEFINITIONS.

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this title.

SEC. 103. FINDINGS.

The Congress finds that—

(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;

(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;

(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

SEC. 104. PUBLICATION OF LIST OF RECOGNIZED TRIBES.

(a) PUBLICATION OF THE LIST.—The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) FREQUENCY OF PUBLICATION.—The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

APPENDIX I — FEDERALLY RECOGNIZED INDIAN TRIBE LIST ACT OF 1994, AS CODIFIED IN THE U.S. CODE, 25 U.S.C. §§ 479a & 479a-1

§ 479a. Definitions

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 479a-1 of this title.

(Pub. L. 103-454, Title I, § 102, fn. 2, 1994, 108 Stat. 4791.)

§ 479a-1. Publication of list of recognized tribes

(a) Publication of the list

The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

(Pub. L. 103-494, Title I, § 104, Nov. 2, 1994, 108 Stat. 4762.)

APPENDIX J — PERTINENT EXCERPTS OF 25 C.F.R. PART 83 (1996)

PART 83—PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE

* * *

§ 83.1 Definitions.

* * *

Autonomous means the exercise of political influence or authority independent of the control of any other Indian governing entity. Autonomous must be understood in the context of the history, geography, culture and social organization of the petitioning group.

* * *

Community means any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. *Community* must be understood in the context of the history, geography, culture and social organization of the group.

* * *

Continuously or *continuous* means extending from first sustained contact with non-Indians throughout the group's history to the present substantially without interruption.

* * *

Appendix J

Historically, *historical* or *history* means dating from first sustained contact with non-Indians.

Indian group or *group* means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.

Indian tribe, also referred to herein as *tribe*, means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to exist as an Indian tribe.

* * *

Letter of intent means an undocumented letter or resolution by which an Indian group requests Federal acknowledgment as an Indian tribe and expresses its intent to submit a documented petition.

* * *

Previous Federal acknowledgment means action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States.

Appendix J

Sustained contact means the period of earliest sustained non-Indian settlement and/or governmental presence in the local area in which the historical tribe or tribes from which the petitioner descends was located historically.

Tribal relations means participation by an individual in a political and social relationship with an Indian tribe.

* * *

§ 83.2 Purpose.

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

Appendix J

§ 83.3 Scope.

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) Indian tribes, organized bands, pueblos, Alaska Native villages, or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs may not be reviewed under the procedures established by these regulations.

(c) Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations. The fact that a group that meets the criteria in § 83.7 (a) through (g) has recently incorporated or otherwise formalized its existing autonomous political process will be viewed as a change in form and have no bearing on the Assistant Secretary's final decision.

(d) Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged

under these regulations. However, groups that can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or have been associated in some manner with an acknowledged North American Indian tribe.

(e) Further, groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.

(f) Finally, groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

(g) Indian groups whose documented petitions are under active consideration at the effective date of these revised regulations may choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994. This option shall apply to any petition for which

a determination is not final and effective. Such petitioners may request a suspension of consideration under § 83.10(g) of not more than 180 days in order to provide additional information or argument.

APPENDIX K — 1867 AGREEMENT WITH THE DELAWARES

ARTICLES OF AGREEMENT

WITH THE

DELAWARES,

Made this 8th day of April, A.D. 1867, between the Cherokee Nation, represented by William P. Ross, Principal Chief, Riley Keys, and Jessie Busheyhead, delegates duly authorized parties of the first part, and the Delaware tribe of Indians, represented by John Connor, Principal Chief, Charles Journeycake, Assistant Chief, Isaac Journeycake, and John Sarcoxie, delegates for and on behalf of said Delaware tribe, duly authorized, witnesseth:

WHEREAS, by the 15th article of a certain treaty between the United States and the Cherokee Nation, ratified August 11, 1866, certain terms were provided, under which friendly Indians might be settled upon unoccupied lands in the Cherokee country, east of the line of 96° of west longitude, the price to be paid for such lands to be agreed on by the Indians to be thus located and the Cherokee Nation, subject to the approval of the President of the United States; and, WHEREAS, by a treaty between the United States and the Delaware tribe of Indians, ratified August 10, 1866, the removal of the said Delawares to the Indian country, south of Kansas, was provided for, and in the 4th article whereof an agreement was made by the United States to sell to the Delawares a tract of land, being part of a tract the cession of

which by the Cherokees to the United States was then contemplated, and, WHEREAS, no-such cession of land was made by the Cherokees to the United States, but, in lieu thereof, terms were provided as hereinbefore mentioned, under which friendly Indians might be settled upon their lands; and, WHEREAS, a full and free conference has been held between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee Nation: NOW, THEREFORE, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfillment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres of land for each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the office of Indian affairs, being the list of the Delawares who elect to remove to the "Indian country," to which list may be added, only with the consent of the Delaware Council, the names of such other Delawares as may, within one month after the signing of this agreement, desire to be added thereto; and the selections of the lands to be purchased by the Delawares, may be made by said Delawares in any part of the Cherokee reservation east of said line of 96°, not already selected and in possession of other parties; and in case the Cherokee lands shall hereafter be allotted among the members of said Nation, it is agreed that the aggregate amount of land herein provided

for the Delawares, to include their improvements according to the legal subdivisions, when surveys are made (that is to say, 160 acres for each individual), shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation; nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon the native citizens thereof; *provided*, that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the constitution and laws of said Cherokee Nation.

And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees, from the Delaware funds, now held or hereafter received by the United States, a sum of money, equal to one dollar per acre, for the whole amount of 160 acres of land, for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions thereto, heretofore provided for. And the Secretary of the Interior is authorized and requested to sell any United States stocks belonging to the Delawares, to procure funds necessary to pay for said lands; but, in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee Nation, at their market value, at the date of such transfer. And the said Delawares further agree, that there shall be paid, from their funds, now or hereafter to come into possession of the United States, a sum of money, which shall sustain the same proportion to the existing

Cherokee National fund, that the number of Delawares registered as above mentioned, and removing to the Indian country, sustains to the whole number of Cherokees residing in the Cherokee Nation. And, for the purpose of ascertaining such relative numbers, the registers of the Delawares herein referred to with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculation as to the Delawares; and an accurate census of the Cherokees residing in the Cherokee Nation, shall be taken, under the laws of that Nation, within four months, and properly certified copies thereof filed in the office of Indian Affairs, which shall be the basis of calculation as to the Cherokees. And, that there may be no doubt hereafter, as to the amount to be contributed to the Cherokee National fund by the Delawares, it is hereby agreed, by the parties hereto, that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is $678,000. And the Delawares further agree, that in calculating the total amount of said National fund, there shall be added to the said sum of $678,000, the sum of $1,000,000, being the estimated value of the Cherokee neutral lands in Kansas, thus making the whole Cherokee National fund $1,678,000, and this last mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund; *provided*, that, as the $678,000 of funds now on hand, belonging to the Cherokees, is chiefly composed of stocks of different values, the Secretary of the Interior may transfer, from the Delawares to the Cherokees, a proper proportion of the stocks now owned by the Delawares, of like grade and value, which transfer shall be in part of the *pro rata* contribution herein provided for by the Delawares to the funds of the Cherokee Nation; but the balance of the *pro*

rata contribution by the Delawares to said fund, shall be in cash or United States bonds, at their market value. All cash, and all proceeds of stocks, whenever the same may fall due or be sold, received by the Cherokees from the Delawares under this agreement, shall be invested and applied in accordance with the 23d article of the treaty with the Cherokees, of August 11th, 1866.

On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other,) in the national funds, as native Cherokees, save as hereinbefore provided. And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.

WM. P. ROSS, Principal Chief,
RILEY KEYES,
Cherokee Delegation.

his
JOHN [X] CONNOR, Principal Chief.
mark

CHARLES JOURNEYCAKE.
ISAAC JOURNEYCAKE

his
JOHN [X] SARCOXIE.
mark

Delaware Delegation.

Appendix K

Executed and delivered in our presence by the above named delegates of the Cherokee and Delaware Nations, at the city of Washington, in the District of Columbia, the day and year first above written.

JOHN G. PRATT.
WM. A. PHILLIPS.
EDWARD S. MENAGUS.

Ratified by the National Committee, June 15th, 1867.

SMITH CHRISTIE,
President Nat. Committee.

JNO. YOUNG,
Speaker of Council

Supreme Court, U.S.
FILED
JUL 18 2005
OFFICE OF THE CLERK

(4)
No. 04-1368

In the Supreme Court of the United States

DELAWARE TRIBE OF INDIANS, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
KELLY A. JOHNSON
Acting Assistant Attorney General
KATHERINE J. BARTON
DAVID C. SHILTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that *Cherokee Nation* v. *Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127 (1904), established that the Delaware Tribe had abandoned its organized tribal status under an 1867 Agreement with the Cherokee Nation.

2. Whether the court of appeals erred by refusing to give deference to the Department of the Interior's interpretation of the 1867 Agreement.

3. Whether the court of appeals erred in finding that the Department of the Interior had acted arbitrarily and capriciously by not using or waiving the federal acknowledgment procedures found at 25 C.F.R. Part 83 to determine whether the Delaware Tribe maintained a government-to-government relationship with the United States.

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In the Supreme Court of the United States

No. 04-1368

DELAWARE TRIBE OF INDIANS, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 389 F.3d 1074. The opinions of the district court (Pet. App. 31a-55a, 56a-66a) are reported at 241 F. Supp. 2d 1374 and 241 F. Supp. 2d 1368.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2004. Pet. App. 1a. Petitions for rehearing were filed by the Delaware Tribe of Indians and by the Secretary of the Interior. An order denying the petition of the Delaware Tribe was entered on January 11, 2005, and an order granting in part, modifying the previous decision, and otherwise denying the petition of the Secretary was entered on February 16, 2005 (Pet. App. 67a-68a, 69a-70a). The petition for a writ of certiorari

was filed on April 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 23, 1996, the Assistant Secretary of the Interior for Indian Affairs issued a final decision confirming a direct, government-to-government relationship between the United States and petitioner Delaware Tribe of Indians. 61 Fed. Reg. 50,862 (Pet. App. 71a-76a). The 1996 decision formally retracted a letter of May 24, 1979, in which the Bureau of Indian Affairs, acting through the Acting Deputy Commissioner, had determined that the Department of the Interior would generally engage in government-to-government relations with the Delaware Tribe only through respondent Cherokee Nation of Oklahoma, and that the Department would engage in direct relations with the Delaware Tribe solely with respect to the Tribe's claims against the United States. The 1996 decision gave notice that the Department considered "the Delaware Tribe of Indians [to be] a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe," and that, "[a]s a separate sovereign, the Delaware Tribe of Indians will have the same legal rights and responsibilities as other tribes, consistent with federal law." 61 Fed. Reg. at 50,863.

The 1996 decision was based on a "comprehensive legal analysis of the pertinent treaties and agreements as well as a review of the Department of the Interior's administrative practice." 61 Fed. Reg. at 50,863. That analysis was set forth in a June 19, 1996, memorandum by the Associate Solicitor of the Interior for Indian Affairs. C.A. App. 241-266. As explained in the memoran-

dum, the United States entered into a treaty with the Cherokee Nation in 1866 (1866 Treaty), 14 Stat. 799, which provided in Article 15 that other Tribes could settle on Cherokee territory (in what later became the State of Oklahoma) under one of two options, 14 Stat. 803. See Pet. App. 78a-80a. First, Tribes wishing to abandon their tribal organization and incorporate into the Cherokee Nation could make a single payment for the right to treatment "on equal terms" with Cherokee citizens. *Id.* at 79a. Second, Tribes wishing to preserve their own tribal organizations and to maintain distinct tribal laws, customs, usages could make two payments, one for a "district of country" equal to 160 acres for each member of the incoming Tribe, and a second to "enjoy all rights of native Cherokees." *Ibid.*

The Associate Solicitor's memorandum determined that, pursuant to an 1867 agreement between the Delaware Tribe and the Cherokee Nation (the 1867 Agreement) (Pet. App. 91a-96a), the Delaware Tribe had made the two payments called for in the "preservation" option of Article 15 of the 1866 Treaty, thus preserving its distinct tribal organization and maintaining its own tribal laws, customs, and usages, while at the same time obtaining for its members the right to equal treatment as Cherokee citizens. The Associate Solicitor found that conclusion to be consistent both with provisions of an 1866 treaty between the United States and the Delaware Tribe, 14 Stat. 793 (Pet. App. 77a-78a), which contemplated that the Tribe would preserve its tribal organization when it moved to Cherokee territory, and with contemporaneous expressions of the Delaware Tribe's intent. See C.A. App. 244-247.

The Associate Solicitor's memorandum also explained that, after the Delaware Tribe relocated to

Cherokee territory, both Congress and the Executive Branch had treated the Delaware Tribe as an independent tribal entity with the ability to carry out tribal governmental functions. For instance, the Delaware Tribe over the years maintained a functioning government in the form of a Business Committee and a general council, and the Tribe in 1958 formalized its government in bylaws approved by the Department of the Interior. The Associate Solicitor also observed that this Court, in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 77 (1977), had affirmed that the Delaware Tribe was a federally recognized Tribe. For those reasons, the Associate Solicitor's memorandum determined that the position adopted in the 1979 letter, *viz.*, that the Delaware Tribe generally was to be dealt with only through the Cherokee Nation, was inconsistent with the historical record and with the Department's treatment of the Delaware Tribe for nearly a century. C.A. App. 247-266.

2. On October 2, 1996, respondent Cherokee Nation brought an action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, seeking to overturn the Department's 1996 decision to restore direct, government-to-government relations with the Delaware Tribe. The action was filed in the District Court for the District of Columbia. That court granted the government's motion to dismiss under Federal Rule of Civil Procedure 19, on the ground that the complaint had failed to name an indispensable party, the Delaware Tribe, which could not be joined due to its sovereign immunity. *Cherokee Nation of Okla.* v. *Babbitt*, 944 F. Supp. 974 (D.D.C. 1996).

The Court of Appeals for the District of Columbia Circuit reversed on the Rule 19 issue, concluding that the Delaware Tribe could not assert sovereign immunity as against the Cherokee Nation. *Cherokee Nation of*

Okla. v. *Babbitt*, 117 F.3d 1489, 1503 (D.C. Cir. 1997). The court of appeals expressly limited its holding to the Rule 19 issue, leaving "for initial decision by the district court the proper interpretation of the 1867 agreement with the Delaware Tribe as a party to the proceedings and in light of the full administrative record, which is not before this court." *Id.* at 1503 n.15. On remand, the Delaware Tribe was joined as a defendant. The district court then concluded that it lacked personal jurisdiction over the Delaware Tribe and transferred the case to the District Court for the Northern District of Oklahoma. Pet. App. 4a.

3. a. The District Court for the Northern District of Oklahoma upheld the 1996 decision. Pet. App. 31a-66a. The court held that the Department's decision was owed substantial deference, *id.* at 36a-45a, and that the decision was not arbitrary or capricious but rather, was consistent with congressional actions and the decisions of this Court, *id.* at 62a-66a.

b. The court of appeals reversed. Pet. App. 1a-30a. The court explained at the outset its understanding that the Department's 1996 decision was based "solely" on an interpretation of the 1867 Agreement and 1866 treaties, and that the case thus turned exclusively "on the status of the Delawares under the treaties and the agreements entered into by the Cherokees and Delawares in the 1860s." *Id.* at 6a-7a. The court specifically left "for another day what effect, if any, the post-1867 legislative and executive dealings with the Delawares had on their alleged status as a tribe." *Id.* at 6a-7a n.2; see *id.* at 24a ("Whether the Delawares were reconstituted—be it through Act of Congress or administrative practice—sometime after 1867 is not before us.").

The court gave no deference to the Department's interpretation of the 1866 treaties and 1867 Agreement, reasoning that Congress had not given the agency discretion to administer those instruments. Pet. App. 7a. The court construed the 1867 Agreement and 1866 treaties as establishing that the Delaware Tribe had selected the incorporation option rather than the preservation option, and that the Tribe thus had become absorbed into the Cherokee Nation rather than maintaining a distinct tribal identity. *Id.* at 7a-24a.

The court believed that its conclusion to that effect was compelled by this Court's decisions in *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127 (1904), and *Cherokee Nation* v. *Journeycake*, 155 U.S. 196 (1894). Pet. App. 12a-17a. The court also undertook its own analysis of the 1867 Agreement and the 1866 treaties, and, in particular, the two payments made by the Delaware Tribe to the Cherokees under the 1867 Agreement. *Id.* at 17a-22a. The court concluded, contrary to the Department of the Interior, that the second payment for the purchase of land occupancy rights was not intended to preserve the Delaware's tribal identity. Pet. App. 21a. Finally, the court rejected the government's and the Delaware Tribe's reliance on *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977), in which this Court observed that the Delaware Tribe, "[d]espite their association with the Cherokees, * * * have over the years maintained a distinct group identity, and they are today a federally recognized tribe," *id.* at 77. In the court of appeals' view, *Weeks* at most stood for the proposition that the Delaware Tribe had been reconstituted

for the purpose of asserting claims against the United States. Pet. App. 23a-24a.[1]

ARGUMENT

The court of appeals erred in its understanding of the effect of the 1867 Agreement on the status of the Delaware Tribe as a distinct Tribe with a government-to-government relationship with the United States. This Court's intervention is not warranted at this time, however, particularly because the court of appeals expressly left open the possibility that the Department could determine that the Delaware's status as a federally-recognized Tribe has been restored by later congressional and administrative actions.

1. Rejecting the Department's interpretation of the 1867 Agreement, the court of appeals found that the two payments made by the Delaware Tribe under that Agreement did not evidence an intent to proceed under the "preservation option" established by Article 15 of the 1866 Treaty with the Cherokee. The court of appeals concluded that even though the 1867 Agreement required the Delawares to make two payments—one for rights as Cherokees and one for land in the amount of 160 acres for each individual Delaware moving to Cherokee territory—the Agreement nonetheless did not invoke the preservation option. That conclusion is incorrect, and the court of appeals gave no convincing alternative explanation of the second payment. The court

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[1] Judge Seymour concurred in the judgment. Pet. App. 26a-31a. She believed that the majority "unnecessarily denigrates the contrary position of the Delaware Tribe and the Department of Interior, which rely on the long and proud history of the Delaware Tribe's relations with the federal government to argue that the Tribe maintained its tribal sovereignty." *Id.* at 26a.